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THE
LAW AND PRACTICE
OF
BANKING CORPORATIONS
UNDER
DOMINION ACTS.

BY
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Entered according to Act of Parliament of Canada, in the year of our Lord one thousand eight hundred and eighty-eight, by FRANK WEIR, in the Office of the Minister of Agriculture.

PREFACE.

THE want of a Text Book on the Law and Practice of Banking, specially applicable to the Dominion of Canada, has induced the Author to prepare such a Work, which he now presents to the favourable consideration of Bankers and Merchants.

In preparing this volume he has not attempted to usurp the office of counsel in complicated cases, aiming only to present a clear exposition of those general principles of banking law with which every Bank Director, Manager, and Officer should be fully acquainted. Nor is such a knowledge less necessary to the Merchant, and those having the conduct of his financial affairs.

It is hoped that this Work will also be found a useful addition to the Libraries of professional men, on account of the numerous judgments embodied in it, all of which have been carefully compiled and fully indexed.

Primarily, the Author is indebted to the leading English and American text writers, more especially, as will be seen, to *Grant* and *Morse*, for the general principles of law which have been enunciated; and secondarily, to the decisions of

Canadian Courts, which latter have enabled him to note the manner in which those principles have been interpreted and applied in the various Provinces.

It will be seen that many points commented upon have not yet come before our Courts for consideration, and the Author has had to place reliance on foreign rulings. Other points, which have been adjudicated upon, may, should they again arise, receive a different interpretation if taken to the higher Courts.

F. .W

MONTREAL, 1ST JUNE, 1888.

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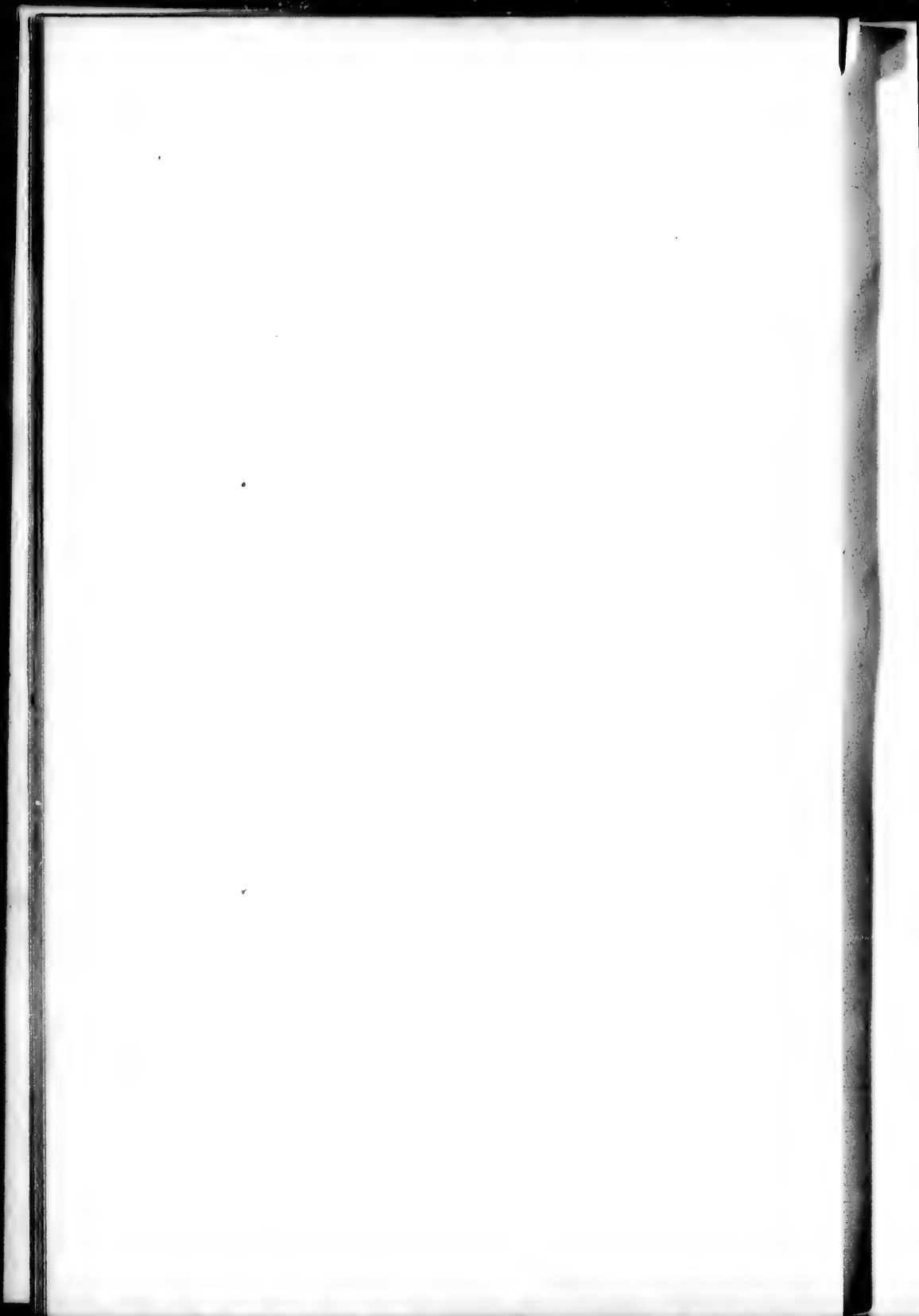
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INTRODUCTION.

THE business of banking consists in dealing in coin and bullion, bills of exchange, promissory notes and other negotiable securities, collecting bills and notes, receiving deposits, issuing circulating notes and letters of credit, and dealing generally in *floating* as distinguished from *fixed* capital.

The large capital required to carry on the business of most civilized countries has led to the establishment of Joint Stock banks ; and while in the money centres of Europe and the United States private bankers do a large and profitable business, the great bulk of banking in Canada is carried on by the chartered banks.

The banker whose duty it is to conduct the various and extensive operations of banking has a task of great responsibility, and the knowledge required to enable him to discharge successfully the duties of his calling may be said to have raised his business to the dignity of a profession. A knowledge of the laws and customs which govern banking transactions must be carefully acquired, and while no mere treatise can take the place of experience, prudence and sound judgment, the prudent banker will not fail to inform himself on all points of law and practice connected with his profession.

At present the information which the banker requires has to be obtained from various sources, and the object of the present work is to present in one volume the knowledge which cannot now be so obtained.

It is not necessary in a work of this kind to enter into any lengthened account of the origin and growth of banking institutions, but it may be well to notice briefly the causes which led to their establishment and which contributed to their growth.

If, in this country at least, incorporated companies have monopolized, so to speak, the business of banking, the private bankers may lay claim to a much longer descent, as

their origin is almost lost in antiquity. At the commencement of the Christian era, it seems to have been a common practice for prudent and careful people to carry their money to the "exchangers" or bankers "that they might receive their own with usury."

The gentlemen bankers of antiquity did not, however, like their successors of modern times, "dwell in marble halls," but sat in public places on wooden benches with tables before them, some of those of Jerusalem occupying the very porch of the Temple.

The early bankers were evidently in the first place dealers in money or exchanges, and as they required to keep "strong boxes" for the safety of their treasures, became in time the custodians of other people's savings, just as at a later period in England the Goldsmiths occupied a similar position.

It was not, however, until the year A.D., 1171, that we have any authentic record of the establishment of a bank. In that year the Bank of Venice, a bank of deposit only, opened its doors, and continued for six hundred years to provide a place of safety for the money and valuables, not only of Venice but of a great part of Europe. Two hundred years later the Bank of St. George at Genoa was established, and appears to have been the first bank of discount. Banks, however, did not come into existence in those days so rapidly as in later times, as the next important institution the Bank of Amsterdam was not opened till two hundred and forty years later, and it was not till eighty years more had elapsed that the Bank of England was established, in 1691. The establishment of banks in Scotland and other European countries soon followed.

In Canada the early French settlers followed the customs of their forefathers, and "counted down their crowns and caroluses" to each other for generations. Having suffered severely through the "Assignats," issued under the French regime, and only redeemed at a fraction of their nominal value, they naturally dreaded all kinds of paper money.

It was not therefore till near the close of the second decade of the present century, when British merchants had become

largely interested in the commerce of the country, that chartered banks found a foothold in Canada.

The Bank of Montreal was opened on the third of November, 1817, having a paid up capital of £87,500 or \$350,000. It was incorporated in 1818, its first issue being dated the first of January of that year. The Quebec Bank commenced business in July, 1819, with a paid up capital of £52,500, or \$210,000.

The Banque du Peuple established as a banking firm by Viger, De Witt & Co., obtained its charter in 1835. The Bank of British North America began business in 1836, and was incorporated by Royal Charter at the union of the two Provinces in 1840. The Bank of Upper Canada having its head office in Toronto was established in 1819, to meet the growing requirements of commerce in the Upper Province.

The charters of Canadian Banks were, and still are, modeled partly on the banking system of Scotland and partly on that of the United States. The comparatively large capital, numerous branches, and note circulation resembling the Scottish banks, while the liability limited in extent, and the method of doing business is more in accordance with the American model.

For many years the failure of a Canadian Bank was a thing unknown, the only suspension of Specie Payments among the Banks occurring in 1837, during the great panic in the United States, and decided upon to protect their *reserves*.

Until 1866 no bank of any standing had closed its doors, but in that year the Bank of Upper Canada suspended payment.

From 1853 till 1864 this bank kept the Government Account, to which it was largely indebted at the time of its suspension. Its capital (\$3,939,267) was entirely lost, and both the Government and other creditors lost heavily, but the double liability was never enforced.

In 1867 another important institution suspended, namely, the Commercial Bank of Canada, having a paid up capital of \$4,000,000, and its head office at Kingston. The bill-holders

and depositors were paid in full, but the stockholders lost two-thirds of their stock, receiving payment of the other third in the stock of the Merchants Bank of Canada into which it was merged in March, 1868. More recent suspensions and failures are yet familiar to the present generation, and need not be referred to here.

From 1854 to 1860, during the exciting times of the Crimean War, and the building of the first great Canadian railroads, bank charters were granted with too little regard to the character of the applicants, and as a natural result a number of these were obtained by, or fell into the hands of, speculators, who used the privileges thus acquired to defraud the public. Fortunately the character of these institutions soon became known, and when they collapsed the losses sustained were unimportant. The Colonial Bank and the Intercolonial Bank, both of Toronto, and the Bank of Clifton, were of this class. The charters of these institutions, as well as of some others which had never been put in operation, were shortly afterwards repealed.

This brief notice of Canadian Banking would be incomplete without a reference to the Free Banking Act of 1850.

This Act, drawn up and carried through Parliament by the late lamented Sir Francis Hincks, resembled in many respects the present National banking system of the United States, although existing in Canada ten years before its introduction into the American Republic. It authorized the issue of notes on deposit of Government securities, and conferred other valuable privileges. So long, however, as charters could be obtained authorizing the issue of circulating notes without any such deposit, few availed themselves of the Act, which is no longer in force. The Molsons Bank commenced business under the Free Banking Act, but obtained a special charter two years later. Several other institutions came into existence under the same Act, but soon afterwards obtained special charters or passed out of existence.

An Act respecting Banks and Banking. A. D. 1886.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

1. This Act may be cited as "*The Bank Act.*" 46 Short title.
V., c. 20, s. 1,

2. In this Act, unless the context otherwise requires,—

(a.) The expression "goods, wares and merchandise" includes in addition to the things usually understood thereby, timber, deals, boards, staves, saw-logs and other lumber, petroleum, crude oil, and all agricultural produce and other articles of commerce ;

(b.) The expression "warehouse receipt" means any receipt given by any person, firm or corporation for any goods, wares or merchandise in his or their actual, visible and continued possession as bailee or bailees, in good faith, and not as of his or their own property, and includes receipts from any person who is the keeper of any harbor, cove, pond, wharf, yard, warehouse, shed, storehouse, tannery, mill or other place in Canada, for goods, wares or merchandise in the place or in one or more of the places so kept by him, whether such person is engaged in other business or not, and includes also specifications of timber ;

(c.) The expression "bill of lading" includes all receipts for goods, wares or merchandise, accompanied by an obligation to transport the same from the place where they were received to some other place, whether by land or water, or partly by land and partly by water, and by any mode of carriage whatever ;

(d.) The expression "ship" or "shipment" means the delivery of any article for transport as aforesaid ;

43 V., c. 22, s. 7, *part.*

"The Bank." (c.) The expression "the bank" means any bank to which this Act applies:

To what banks the Act applies.

3. The provisions of this Act apply to every bank incorporated during the session of the Parliament of Canada, held in the forty-third year of Her Majesty's reign or thereafter, or hereafter, whether this Act is specially mentioned in its Act of incorporation or not, as well as to all banks, (except where otherwise expressly mentioned) whose charters or Acts of incorporation are hereby continued, but not to any other, unless extended to it under the special provisions hereinafter made. 34 V., c. 5, s. 2;—43 V., c. 22, s. 1.

Charters continued to 1st July, 1891.

4. The charters or Acts of incorporation of the several banks enumerated in the schedule A to this Act, and any Acts amending them, are hereby continued and shall, subject to the provisions of this Act, as to their incorporation, the amount of capital stock, the amount of each share of such stock, and the chief place of business of each respectively, remain in force until the first day of July, in the year one thousand eight hundred and ninety-one, subject to the right of any such bank to increase its capital stock in the manner hereinafter provided; and as to other particulars this Act shall form and be the charter of each of the said banks, until the said first day of July, one thousand eight hundred and ninety-one, and the provisions hereof shall apply to

As to other particulars.

Proviso: as to forfeiture.

each of them respectively: Provided always, that the said charters or Acts of incorporation are only hereby continued in force in so far as they or any of them are not forfeited or void under the terms thereof or of this Act or any other Act passed or to be passed in that behalf, by non-performance of the conditions of such charters or Acts of incorporation respectively, or by insolvency or otherwise. 34 V., c. 5, s. 1;—43 V., c. 22, s. 11.

CAPITAL STOCK.

5. The capital stock of every bank hereafter incorporated, the amount of each share, the name of the bank, and the place where its chief office is to be situate, shall be declared in the Act of incorporation of every such bank. 34 V., c. 5, s. 3.

Matters to be provided for in special Act.

6. No bank hereafter incorporated, unless it is otherwise provided by its Act of incorporation, shall issue notes or commence the business of banking until five hundred thousand dollars of capital have been *bona fide* subscribed and one hundred thousand dollars have been *bona fide* paid up, nor until it has obtained from the Treasury Board a certificate to that effect:

Conditions previous to commencing business by new banks.

2. Such certificate shall be granted by the Treasury Board when it is proved to the satisfaction of such board that such amounts of capital have been *bona fide* subscribed and paid respectively:

When certificate may be granted.

3. If at least two hundred thousand dollars of the subscribed capital of such bank have not been paid up before it commences business, such further amount as is required to complete the said sum shall be called in and paid up within two years thereafter; and it shall not be necessary that more than two hundred thousand dollars of the stock of any bank, whether incorporated before or after the passing of this Act, shall be paid up within any limited period from the date of its incorporation. 34 V., c. 5, s. 7.

A certain sum to be paid up within two years.

Not more than \$200,000 need be paid up.

7. The capital stock of the bank may be increased, from time to time, by the shareholders at any annual general meeting, or at any general meeting specially called for that purpose; and such increase may be agreed on by such proportions at a time as the shareholders determine, and shall be decided by the majority of the votes of the shareholders present at such meeting in person, or represented by proxy. 34 V., c. 5, s. 5.

Increase of capital.

How stock
shall be allot-
ted.

8. Any of the original unsubscribed capital stock, or the increased stock of the bank, shall, when the directors so determine, be allotted to the then shareholders of the bank *pro rata*, and at such rate as is fixed by the directors, but no fraction of a share shall be so allotted; and any of such allotted stock which is not taken up by the shareholder to whom such allotment has been made, within three months from the time when notice of the allotment was mailed to his address, may be opened for subscription to the public, in such manner and on such terms as the directors prescribe. 34 V., c. 5, s. 6.

INTERNAL REGULATIONS.

By-laws may
be made.

9. The shareholders in the bank may regulate, by by-law, the following matters incident to the management and administration of the affairs of the bank, that is to say: the number of the directors, which shall not be less than five and not more than ten, and the quorum thereof; their qualification; the method of filling up vacancies in the board of directors whenever the same occur during each year, and the time and proceedings for the election of directors, in case of a failure of any election on the day appointed for it; the remuneration of the president, vice-president and other directors; and the closing of the transfer book during a certain time, not exceeding fifteen days, before the payment of each semi-annual dividend:

Election.
Qualification
of director.

2. The directors shall be elected annually by the shareholders, and shall be eligible for re-election: Provided, that no director shall hold less than three thousand dollars of the stock of the bank, when the paid-up capital thereof is one million dollars or less, or less than four thousand dollars of stock when the paid-up capital thereof is over one million and does not exceed three millions, or less than five thousand dollars of stock when the paid-up capital thereof exceed three millions: Provided, also, that the foregoing provisions of this section,

Proviso: as
to banks *en*
commandite.

touching directors, shall not apply to a bank *en commandite*, which shall in these matters be governed by the provisions of its charter :

3. The shareholders (or if the bank is *en commandite*, ^{Discounts to directors.} the principal partners) may also regulate, by by-law, the amount of discounts or loans which may be made to directors (or if the bank is *en commandite*, to the principal partners), either jointly or severally, or to any one firm or person, or to any shareholder or to corporations :

4. Provided, that until it is otherwise prescribed by ^{Certain by-laws continued.} by-law under this section, the by-laws of the bank, on any matter which may be regulated by by-law under this section, shall remain in force, except as to any provision fixing the qualification of directors at an amount less than that hereby prescribed ; and no person shall be elected or continue to be a director unless he possesses the number of shares hereby required, or such greater number as are required by any by-law in that behalf, 34 V., c. 5, ss. 28 and 30, *part*.

10. Every shareholder in the bank shall, on all occasions on which the votes of the shareholders are taken, ^{Votes on shares.} have one vote for each share held by him for at least thirty days before the time of meeting : shareholders may vote by proxy, but no person but a shareholder shall be permitted to vote or act as such proxy, and no manager, cashier, bank clerk or other subordinate officer of the bank shall vote, either in person or by proxy, or hold a proxy for that purpose :

2. All questions proposed for the consideration of ^{Majority to the shareholders.} the shareholders shall be determined by the majority of their votes ; the chairman elected to preside at any such meeting of the shareholders shall vote as a shareholder only, unless there is a tie, in which case, except as to the election of a director, he shall have a casting vote : ^{Casting vote.}

3. If two or more persons are joint holders of shares, ^{As to joint holders of shares.} any one of such joint holders may be empowered, by letter of attorney from the other joint holder or holders,

or a majority of them, to represent the said shares, and vote accordingly :

Ballot.

4. In all cases when the votes of the shareholders are taken, the voting shall be by ballot. 34 V., c. 5, s. 27.

Special
general
meetings.

11. The directors of the bank, or any four of them, —or any number not less than twenty-five of the shareholders of the bank, who are together proprietors of at least one tenth of the paid-up capital stock of the bank, by themselves or by their proxies,—may, at any time, call a special general meeting of the shareholders, to be held at their usual place of meeting, upon giving six weeks' previous public notice, specifying, in such notice, the object of such meeting :

Removal of
president,
director, &c.

2. If the object of any such special general meeting is to consider the proposed removal of the president or vice-president, or of a director of the bank, for mal-administration or other specified and apparently just cause, and if a majority of the votes of the shareholders at such meeting are given for such removal, a director to replace him shall be elected or appointed in the manner provided in the by-laws of the bank, or if there are no by-laws providing therefor, then by the shareholders at such meeting ; and if it is the president or vice-president who is removed, his office shall be filled up by the directors in the manner provided in case of a vacancy occurring in the office of president or vice-president. 34 V., c. 5, s. 29.

Board of
directors.

12. The stock, property, affairs and concerns of the bank shall be managed by a board of directors, the number of whom shall be fixed as herein provided, who shall choose from among themselves a president and vice-president ; the directors shall be natural-born or naturalized subjects of Her Majesty, and shall be elected on such day in each year as is appointed by the charter or by any by-law of the bank, and at such time of the day and at such place where the head office of the bank

is situate, as a majority of the directors for the time being appoint; and public notice shall be given by the directors, by publishing the same for at least four weeks ^{Notice of election.} in a newspaper published at the place where the said head office is situate, previous to the time of holding such election; and the election shall be held and made by such of the shareholders of the bank as have paid all calls made by the directors and as attend for the purpose in person or are represented by proxy:

2. All elections of directors shall be by ballot; and ^{Ballot.} the said proxies shall be held and voted upon only by ^{Proxies.} shareholders then present:

3. The persons, to the number fixed by by-law, as ^{Who shall be} hereinbefore provided, who have the greatest number of ^{directors.} votes at any election, shall be directors.

4. If it happens at any election that two or more persons have an equal number of votes, and the election or ^{Provision in case of equality of votes.} non-election of one or more of such persons as a director or directors depends on such equality, then the directors who have a greater number, or the majority of them, shall determine which of the said persons so having an equal number of votes shall be the director or directors, so as to complete the full number; and the said directors, as soon as may be after the said election, shall proceed in like manner to elect, by ballot, two of ^{Election of president, &c.} their number to be president and vice-president respectively:

5. If a vacancy occurs in the board of directors, such ^{Vacancies, how filled.} vacancy shall be filled in the manner provided by the by-laws; but the non-filling of the vacancy shall not vitiate the acts of a quorum of the remaining directors; and if the vacancy so created is in the office of the president or vice-president, the directors, at the first meeting after completion of their number, shall, from among themselves, elect a president or vice-president, who shall continue in office for the remainder of the year. 34 V., c. 5, s. 30.

In certain cases calls must be paid before voting.

13. No shareholder, in any bank to which the three sections next preceding apply, shall vote, either in person or by proxy, on any question proposed for the consideration of the shareholders of the bank at any meeting of such shareholders, or in any case in which the votes of the shareholders of the bank are taken, unless he has paid all calls made by the directors which are then due and payable. 40 V., c. 44, s. 1.

Renewal of proxies.

14. No appointment of a proxy to vote at any meeting of the shareholders of the bank shall be valid for that purpose, unless it has been made or renewed in writing within the three years next preceding the time of such meeting. 43 V., c. 22, s. 12, *part*.

Provision in case of failure of election.

15. If an election of directors is not made on any day when it should be made, the corporation shall not for that cause be deemed to be dissolved, but an election of directors may take place on any other day in such manner as is provided by the by-laws made by the shareholders in that behalf; and the directors then in office shall so remain until a new election is made. 34 V., c. 5, s. 31.

Quorum, &c.

16. At all meetings of the directors not less than three shall constitute a quorum for the transaction of business; and at such meetings the president, or in his absence the vice-president, or in the absence of both of them, one of the directors present, chosen to act *pro tempore*, shall preside; and the president, vice-president or president *pro tempore* so presiding, shall vote as a director, and if there is an equal division on any question, shall also have a casting vote. 34 V., c. 5, s. 32.

General powers of directors.

17. The directors for the time being, or a majority of them, may make by-laws and regulations (not repugnant to the provisions of this Act or the laws of Canada) touching the management and disposition of the stock, property, estate and effects of the bank, and touching the

duties and conduct of the officers, clerks and servants employed therein, and all such other matters as appertain to the business of a bank: Provided always, that all by-laws of the bank lawfully made before the fourteenth day of April, one thousand eight hundred and seventy-one, and now in force, in respect to any matter respecting which the directors may make by-laws under this section (including any by-laws for establishing a guarantee fund for the employees of the bank) shall remain in force until they are repealed or altered by others made under this Act. 34 V., c. 5, s. 33, *part*.

Proviso: as to
by-laws in
force.

18. The directors may appoint as many officers, clerks and servants for carrying on the business of the bank, and with such salaries and allowances, as they consider necessary—and they may also appoint a director or directors for any branch of the bank:

Appointment
of officers, &c.

2. Before permitting any cashier, officer, clerk or servant of the bank to enter upon the duties of his office, the directors shall require him to give bond or other security to the satisfaction of the directors, for the due and faithful performance of his duties. 34 V., c. 5, s. 33, *part*.

Security to be
given.

SHARES AND CALLS.

19. Books of subscription may be opened, and shares of the capital stock may be made transferable, and the dividends accruing thereon may be made payable in the United Kingdom, in like manner as such shares and dividends are respectively made transferable and payable at the head office of the bank; and for that purpose the directors may, from time to time, determine the proportion of the shares which shall be so transferable in the United Kingdom, and make such rules and regulations, and prescribe such forms, and appoint such agents, as they deem necessary. 34 V., c. 5, s. 17.

Subscription
and transfer
of stock in
United
Kingdom.

Payment of
shares.

Provision: ten
per cent. pay-
able on sub-
scription.

Calls on
shares.

Time of calls
and notice.

Limitation.

Recovery of
calls.

Recovery by
suit.

What only
need be
proved.

20. The shares of the capital stock shall be paid in by such instalments, and at such times and places as the directors appoint, and executors, administrators and curators paying the instalments upon the shares of deceased shareholders shall be indemnified for paying the same: Provided always, that no share shall be held to be lawfully subscribed for, unless a sum equal to at least ten per centum on the amount subscribed for is actually paid at the time of or within thirty days after the time of subscribing. 34 V., c. 5, s. 18.

21. The directors may make such calls of money from the several shareholders for the time being, upon the shares subscribed for by them, respectively, as they find necessary:

2. Such calls shall be made at intervals of not less than thirty days, and upon notice to be given at least thirty days prior to the day on which such call shall be payable; and no such call shall exceed ten per cent. of each share subscribed. 34 V., c. 5, s. 34, *part*.

22. The directors may, in the corporate name of the bank, sue for, recover and get in all such calls, or cause and declare such shares to be forfeited to the bank, in case of non-payment of any such call:

2. An action may be brought to recover any money due on any such call; and it shall not be necessary to set forth the special matter in the declaration, but it shall be sufficient to allege that the defendant is holder of one share or more, as the case may be, in the capital stock of the bank, and is indebted to the bank for a call or calls upon such share or shares in the sum to which the call or calls amount, as the case may be, stating the amount and number of such calls, whereby an action has accrued to the bank to recover the same from such defendant by virtue of this Act; and to entitle the directors to recover in such action it shall be sufficient to prove by any one witness (a shareholder being competent) that the defendant, at the time of making any

such call, was a shareholder in the number of shares alleged, and to produce the by-law or resolution of the directors making such call, and to prove notice thereof, given in conformity with such by-law or resolution; and it shall not be necessary to prove the appointment of the directors or any other matter whatsoever. 34 V., c. 5, s. 34, *part.*

23. Provided always, that if any shareholder refuses or neglects to pay any instalment upon his shares of the capital stock at the time appointed by such call, as aforesaid, such shareholder shall incur a forfeiture to the use of the bank of a sum of money equal to ten per cent. on the amount of such shares; and the directors of the bank may, without any previous formality, other than thirty days' public notice of their intention so to do, sell at public auction the said shares, or so many of the said shares as shall, after deducting the reasonable expenses of the sale, yield a sum of money sufficient to pay the unpaid instalments due on the remainder of the said shares and the amount of forfeitures incurred upon the whole; and the president, or vice-president, manager or cashier of the bank, shall execute the transfer to the purchaser of the shares so sold; and such transfer, when accepted, shall be as valid and effectual in law as if the same had been executed by the original holder of the shares thereby transferred; but the directors, or the shareholders at a general meeting, may, notwithstanding anything in his section contained, remit either in whole or in part, and conditionally or unconditionally, any forfeiture incurred by the non-payment of instalments as aforesaid, or the bank may enforce the payment of any call or calls by suit instead of declaring the shares forfeited. 34 V., c. 5, s. 35.

ANNUAL STATEMENT.

24. At every annual meeting of the shareholders for the election of directors, the out-going directors shall

Forfeiture of
share for
non-payment
of calls.

Sale in such
case.

And transfer.

Proviso.

Statement to
be laid before
annual
meeting.

submit a clear and full statement of the affairs of the bank, containing on the one part,—

Liabilities.

The amount of the capital stock paid in, the amount of notes of the bank in circulation, the net profits made, the balances due to other banks and institutions, and the cash deposited in the bank,—distinguishing deposits bearing interest from those not bearing interest; and on the other part,—

Assets.

The amount of the current coin, the gold and silver bullion, and the Dominion notes in the vaults of the bank, the balances due to the bank from other banks and institutions, the value of the real and other property of the bank, and the amount of debts owing to the bank,—including and particularizing the amounts so owing upon bills of exchange, discounted notes, mortgages and other securities,—

What statement shall show.

Exhibiting on the one hand the liabilities of, or the debts due by the bank, and on the other hand, the assets and resources thereof; and the said statement shall also exhibit the rate and amount of the last dividend declared by the directors, the amount of reserved profits at the time of declaring the said dividend, and the amount of debts due to the bank, overdue and not paid, with an estimate of the loss which will probably accrue thereon. 34 V., c. 5, s. 36.

INSPECTION BY DIRECTORS.

Inspection of books, &c.

25. The books, correspondence and funds of the bank shall, at all times, be subject to the inspection of the directors, but no shareholder who is not a director shall be allowed to inspect the account of any person dealing with the bank. 34 V., c. 5, s. 37.

DIVIDENDS.

Dividends.

26. The directors of the bank shall declare half-yearly dividends of so much of the profits of the bank as to the majority of them seems advisable, and not inconsistent with the provisions of the two sections of

this Act next following; and they shall give at least thirty days' public notice of the payment of such dividends previously to the date fixed for such payment. 34 V., c. 5, s. 38.

27. No dividend or bonus shall ever be declared so as to impair the paid up capital; if any dividend or bonus is so declared or made payable, the directors who knowingly and wilfully concur therein shall be jointly and severally liable for the amount thereof, as a debt due by them to the bank; and if any part of the paid-up capital is lost, the directors shall, if all the subscribed stock is not paid up, forthwith make calls upon the shareholders to an amount equivalent to such loss; and such loss (and the calls, if any) shall be mentioned in the next return made by the bank to the Minister of Finance and Receiver General: Provided that, in any case in which the capital has been impaired as aforesaid, all net profits shall be applied to make good such loss. 34 V., c. 5, s. 10.

Dividend not to impair capital.
Capital lost to be made up.

28. No division of profits, either by way of dividends or bonus, or both combined, or in any other way, exceeding the rate of eight per cent. per annum, shall be made by the bank, unless, after making the same, it has a rest or reserved fund equal to at least twenty per cent. of its paid-up capital: and all bad and doubtful debts shall be deducted before the amount of such rest is calculated. 34 V., c. 5, s. 11.

Dividend limited unless there is a certain reserve.

TRANSFER AND TRANSMISSION OF SHARES.

29. The shares of the capital stock shall be personal estate, and shall be assignable and transferable at the chief place of business of the bank or at any of its branches which the directors appoint for that purpose, and according to such form as the directors prescribe; but no assignment or transfer shall be valid unless it is made and registered and accepted by the person to

Shares and transfer thereof.

whom the transfer is made, in a book or books kept by the directors for that purpose, nor unless the person making the same has, if required by the bank, previously discharged all his debts or liabilities to the bank which exceed in amount the remaining stock, if any, belonging to such person, valued at the then current rate; and no fractional part of a share, or less than a whole share, shall be assignable or transferable. 42 V., c. 45, s. 1, *part.*

List of transfers to be kept.

30. A list of all transfers of shares, registered each day in the books of the bank showing the parties to such transfers and the number of shares transferred in each case, shall be made up at the end of each day and kept at the chief place of business of the bank for the inspection of its shareholders. 34 V., c. 5, s. 20.

Sale of shares under execution.

31. When any share of the capital stock has been sold under a writ of execution, the officer by whom the writ was executed shall, within thirty days after the sale, leave with the cashier, manager or other officer of the bank, an attested copy of the writ, with the certificate of such officer indorsed thereon, certifying to whom the sale has been made; and thereupon (but not until after all debts and liabilities of the holder of the share to the bank, and all liens existing in favor of the bank thereon, have been discharged as herein provided), the president, vice-president, manager or cashier of the bank shall execute the transfer of the share so sold to the purchaser; and such transfer when duly accepted, shall be, to all intents and purposes, as valid and effectual in law as if it had been executed by the holder of the said share. 42 V., c. 45, s. 1, *part.*

Transmission of shares otherwise than by transfer, how authenticated.

32. If the interest in any share in the capital stock becomes transmitted in consequence of the death, bankruptcy or insolvency of any shareholder, or in consequence of the marriage of a female shareholder, or

by any other lawful means than by a transfer according to the provisions of this Act, such transmission shall be authenticated by a declaration in writing, as hereinafter mentioned, or in such other manner as the directors of the bank require, and every such declaration shall distinctly state the manner in which and the person to whom such shares have been transmitted, and shall be made and signed by such person; and the person making and signing such declaration shall acknowledge the same before a judge of a court record, or before the mayor, provost or chief magistrate of a city, town, borough or other place, or before a notary public, where the same is made and signed; and every declaration so signed and acknowledged shall be left with the cashier, manager or other officer or agent of the bank, who shall thereupon enter the name of the person entitled under such transmission in the register of shareholders; and until such transmission has been so authenticated, no person claiming by virtue of any such transmission shall be entitled to participate in the profits of the bank, or to vote in respect of any such share of the capital stock: Provided always, that every such declaration and instrument as, by this and the next following section of this Act, are required to perfect the transmission of a share in the bank which is made in any other country than Canada, or any other British colony in North America or in the United Kingdom, shall be further authenticated by the British consul or vice-consul, or other the accredited representative of the British Government in the country where the declaration is made, or shall be made directly before such British consul or vice-consul or other accredited representative; and provided also, that the directors, cashier or other officer or agent of the bank may require corroborative evidence of any fact alleged in any such declaration. 34 V., c. 5, s. 21.

Proviso: as to declaration made out of Canada, &c.

Proviso: further evidence may be required.

33. If the transmission of any share of the capital stock has taken place by virtue of the marriage of a

Transmission by marriage of female shareholder.

female shareholder, the declaration shall be accompanied by a copy of the register of such marriage, or other particulars of the celebration thereof, and shall declare the identity of the wife with the holder of such share, and shall be made and signed by such female shareholder and her husband; and they may include therein a declaration to the effect that the share transmitted is the separate property and under the sole control of the wife, and that she may receive and grant receipts for the dividends and profits accruing in respect thereof, and dispose of and transfer the share itself, without requiring the consent or authority of her husband; and such declaration shall be binding upon the bank and the persons making the same, until the said persons see fit to revoke it by a written notice to that effect to the bank; but the omission of a statement, in any such declaration, that the wife making the same is duly authorized by her husband to make the same, shall not invalidate the declaration. 34 V., c. 5, s. 22.

Transmission,
by decense.

34. If the transmission has taken place by virtue of any testamentary instrument, or by intestacy, the probate of the will, or the letters of administration, or act of curatorship or an official extract therefrom, shall, together with such declaration, be produced and left with the cashier or other officer or agent of the bank, who shall, thereupon, enter the name of the person entitled under such transmission in the register of shareholders. 34 V., c. 5, s. 23.

Further
provision in
such case.

35. If the transmission of any share of the capital stock has taken place by virtue of the decease of any shareholder, the production to the directors and the deposit with them of any authenticated copy of the probate of the will of the deceased shareholder, or of letters of administration of his estate granted by any court in Canada having power to grant such probate or letters of administration, or by any court or authority in England,

Wales, Ireland or any British colony, or of any testament, testamentary or testament dative expedite in Scotland—or, if the deceased shareholder died out of Her Majesty's dominions, the production to and deposit with the directors of any authenticated copy of the probate of his will or letters of administration of his property, or other document of like import granted by any court or authority having the requisite power in such matters, shall be sufficient justification and authority to the directors for paying any dividend, or for transferring or authorizing the transfer of any share in pursuance of and in conformity to such probate, letters of administration, or other such document as aforesaid. 34 V., c. 5, s. 24.

36. Whenever the interest in any share of the capital stock is transmitted by the death of any shareholder or otherwise, or whenever the ownership of or legal right of possession in any such share changes by any lawful means, other than by transfer according to the provisions of this Act, and the directors of the bank entertain reasonable doubts as to the legality of any claim to and upon such share, the bank may make and file in one of the superior courts in the Province in which the head office of the bank is situated, a declaration and petition in writing, addressed to the justices of the court, setting forth the facts and the number of shares previously belonging to the person in whose name such shares stand in the books of the bank, and praying for an order or judgment declaring to whom the said shares belong,—by which order or judgment the bank shall be guided and held fully harmless and indemnified and released from every other claim to the said shares or arising therefrom: Provided always, that notice of such petition shall be given to the person claiming such share, or to the attorney of such person duly authorized for the purpose, who shall, upon the filing of such petition, establish his right to the several shares referred to in

Provision in case of doubt as to person entitled.

Proviso: notice to be given.

Proviso: as to costs.

such petition; and the times to plead and all other proceedings in such cases shall be the same as those observed in analogous cases before the said superior courts: Provided also, that the costs and expenses of procuring such order or judgment shall be paid by the person to whom the said shares are declared lawfully to belong; and that such shares shall not be transferred until such costs and expenses are paid,—saving the recourse of such person against any person contesting his right. 34 V., c. 5, s. 25.

Bank not bound to see to trusts.

37. The bank shall not be bound to see to the execution of any trust, whether expressed, implied or constructive, to which any share of its stock is subject; and the receipt of the person in whose name any such share stands in the books of the bank, or, if it stands in the name of more persons than one, the receipt of one of such persons shall be a sufficient discharge to the bank, for any dividend or any other sum of money payable in respect of such share, unless express notice to the contrary has been given to the bank; and the bank shall not be bound to see to the application of the money paid upon such receipt, whether given by one of such persons or all of them. 34 V., c. 5, s. 26.

Executors and trustees not personally liable.

Exception.

38. No person holding stock in the bank as executor, administrator, guardian or trustee, of or for any person named in the books of the bank as being so represented by him, shall be personally subject to any liability as a shareholder, but the estate and funds in his hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such trust fund would be, if living and competent to hold the stock in his own name; and if the trust is for a living person, such person shall also himself be liable as a shareholder; but if such testator, intestate, ward or person so represented, is not so named in the books of the bank, the executor, administrator,

guardian or trustee shall be personally liable in respect of such stock, as if he held it in his own name as owner thereof. 43 V., c. 22, s. 2.

OBLIGATIONS AND POWERS OF THE BANK.

39. The bank shall always hold, as nearly as practicable, one half of its cash reserves in Dominion notes, and the proportion of such reserves held in Dominion notes shall never be less than forty per cent. thereof; and every bank holding at any time a less amount of its cash reserves in Dominion notes than is prescribed by this section shall incur a penalty of two hundred and fifty dollars for each and every time it appears, by the monthly statement hereinafter mentioned otherwise, that such violation of this section has occurred:

2. The Minister of Finance and Receiver General shall make such arrangements as are necessary for insuring the delivery of Dominion notes to any bank, in exchange for an equivalent amount of specie, at the several offices at which Dominion notes are redeemable, in the cities of Toronto, Montreal, Halifax, St. John (N.B.), Winnipeg, Charlottetown and Victoria, respectively. 34 V., c. 5, ss. 14 and 16;—43 V., c. 22, s. 3;—46 V., c. 20, s. 4.

40. The amount of notes of the bank intended for circulation, issued by the bank and outstanding at any time, shall never exceed the amount of its unimpaired paid-up capital: and no such note for a sum less than five dollars, or for any sum which is not a multiple of five dollars, shall be issued or re-issued by the bank, and all notes for a less sum than five dollars, or which are not such multiple as aforesaid, heretofore issued, shall be called in and cancelled as soon as practicable:

2. If it appears by the monthly statement hereinafter mentioned, made by the bank, that the amount of its notes in circulation has, during the month to which such

Part of
reserve to be
in Dominion
notes.

Penalty for
not holding
due propor-
tion of Do-
minion notes.

Supply of
Dominion
notes.

Amount and
denomination
of bank notes.

Penalties on
banks having
excess of
circulation.

statement relates, exceeded the amount authorized by this section, such bank shall incur a penalty of one hundred dollars, if the amount of such excess of circulation is not over twenty thousand dollars,—a penalty of one thousand dollars, if such excess is over twenty thousand and not over one hundred thousand dollars,—a penalty of five thousand dollars, if such excess is over one hundred thousand dollars, and not over two hundred thousand dollars,—and a penalty of ten thousand dollars, if such excess is over two hundred thousand dollars. 34 V., c. 5, s. 8 ;—43 V., c. 22, s. 12, *part* ;—46 V., c. 20, s. 3.

Redemption
of notes.

41. The bank shall always receive in payment its own notes at par at any of its offices and whether they are made payable there or not ; but shall not be bound to redeem them in specie or Dominion notes at any place other than that at which they are made payable :

Payable at
chief place of
business.

2. The chief place of business of the bank shall always be one of the places at which its notes shall be made payable. 34 V., c. 5, s. 9.

Payments in
Dominion
notes.

42. The bank, when making any payment, shall, on the request of the person to whom the payment is to be made, pay the same, or such part thereof not exceeding sixty dollars as such person requests, in Dominion notes for one, two, or four dollars each, at the option of the receiver. 43 V., c. 22, s. 12, *part* ;—46 V., c. 20, s. 5.

Bonds, notes,
&c., how and
by whom to
be signed.

43. The bonds, obligations and bills obligatory or of credit of the bank under its corporate seal, and signed by the president or vice-president and countersigned by a cashier or assistant cashier, which are made payable to any person, shall be assignable by indorsement thereon ; and bills or notes of the bank signed by the president, vice-president, cashier or other officer appointed by the directors of the bank to sign the same, promising the payment of money to any person or to his order, or to the bearer, though not under the corporate seal of the

bank, shall be binding and obligatory on it in like manner and with the like force and effect as they would be upon any private person, if issued by him in his private or natural capacity, and shall be assignable in like manner as if they were so issued by a private person in his natural capacity : Provided always, that the directors of the bank may, from time to time, authorize or depute any cashier, assistant cashier or officer of the bank, or any director other than the president or vice-president, or any cashier, manager or local director of any branch or office of discount and deposit of the bank, to sign the bills of the bank intended for general circulation, and payable to order or to bearer on demand. 34 V., c. 5, s. 55.

Proviso :
power may be
deputed to
officer.

44. All bank notes and bills of the bank whereon the name of any person intrusted or authorized to sign such notes or bills on behalf of the bank is impressed by machinery provided for that purpose, by or with the authority of the bank, shall be good and valid to all intents and purposes, as if such notes and bills had been subscribed in the proper handwriting of the person intrusted or authorized by the bank to sign the same respectively, and shall be bank notes and bills within the meaning of all laws and statutes whatever, and may be described as bank notes or bills in all indictments and civil or criminal proceedings whatsoever. 34 V., c. 5, s. 56.

Notes may be
signed by
machinery.

45. The bank shall not, either directly or indirectly, lend money or make advances upon the security, mortgage or hypothecation of any lands or tenements, or of any ships or other vessels, or upon the security or pledge of any share of the capital stock of the bank, or of any goods, wares or merchandise, except as authorized in this Act ; and the bank shall not, either directly or indirectly, deal in the buying and selling or bartering of goods, wares or merchandise, or engage or be engaged

Certain busi-
ness may not
be transacted
by the bank.

in any trade whatsoever, except as a dealer in gold and silver bullion, bills of exchange, discounting of promissory notes and negotiable securities, and in such trade generally as appertains to the business of banking; and the bank shall not, either directly or indirectly, purchase or deal in any share of the capital stock of the bank, except when it is necessary to realize upon any such share held by the bank as security for any pre-existing and matured debt:

Penalty for
contraven-
tion.

2. Every bank which violates any provision of this section shall incur a penalty not exceeding five hundred dollars. 34 V., c. 5, s. 40;—38 V., c. 17, s. 1;—46 V., c. 20, s. 9, *part*.

Branches and
agencies.

4. The bank may open branches and agencies and offices of discount and deposit, and may transact business at any place or places in Canada. 34 V., c. 5, s. 4.

Real estate
for occupa-
tion.

47. The bank may acquire and hold real and immovable property for its actual use and occupation and the management of its business, and may sell or dispose of the same, and acquire other property in its stead for the same purposes. 34 V., c. 5, s. 39.

Mortgages as
additional
security.

48. The bank may take, hold and dispose of mortgages and *hypothèques* upon real or personal property, by way of additional security for debts contracted to the bank in the course of its business; and the rights, powers and privileges which the bank is hereby declared to have or to have had in respect of real property mortgaged to it, shall be held and possessed by it, in respect of any personal property which is mortgaged or hypothecated to it. 34 V., c. 5, s. 41.

Purchase of
land under
execution, &c.

49. The bank may purchase any lands or real property offered for sale under execution, or in insolvency, or under the order or decree of a court, as belonging to any debtor to the bank, or exposed to sale by the bank

under a power of sale given to it for that purpose, in cases in which, under similar circumstances, an individual could so purchase, without any restriction as to the value of the lands which it may so purchase,—and may acquire a title thereto as any individual purchasing at sheriff's sale, or under a power of sale, in like circumstances, could do,—and may take, have, hold and dispose of the same at pleasure. 34 V., c. 5, s. 42;—43 V., c. 22, s. 5.

50. The bank may acquire and hold an absolute title in or to land mortgaged to it as security for a debt due or owing to it, either by obtaining a release of the equity of redemption in the mortgaged property, or by procuring a foreclosure, or by other means whereby, as between individuals, an equity of redemption can, by law, be barred,—and may purchase and acquire any prior mortgage or charge on such land; Provided always, that no bank shall hold any real or immovable property howsoever acquired, except such as is required for its own use, for any period exceeding seven years from the date of the acquisition thereof:

2. Every bank which violates any provision of this section shall incur a penalty not exceeding five hundred dollars. 34 V., c. 5, s. 43;—43 V., c. 22, s. 6;—46 V., c. 20, s. 9, *part*.

51. Nothing in any charter, Act or law shall be construed as ever having prevented or as preventing the bank from acquiring and holding an absolute title to and in any such mortgaged lands, whatever the value thereof may be, or from exercising or acting upon any power of sale contained in any mortgage given to it or held by it, authorizing or enabling it to sell or convey away any lands so mortgaged. 34 V., c. 5, s. 44.

52. Every bank advancing money in aid of the building of any ship or vessel shall have the same right

Absolute title may be acquired.

Proviso: sale of property so acquired.

Penalty for contravention.

Title to lands so acquired; power of sale, &c.

As to advances for building ships.

of acquiring and holding security upon such ship or vessel, while building and when completed, either by way of mortgage, *hypothèque*, hypothecation, privilege or lien thereon, or purchase or transfer thereof, as individuals have in the Province wherein such ship or vessel is being built, and for that purpose may avail itself of all such rights and means of obtaining and enforcing such security, and shall be subject to all such obligations, limitations and conditions as are, by the law of such Province, conferred or imposed upon individuals making such advances. 35 V., c. 8, s. 7.

Interpretation
of "Agent."

53. In this section the expression "agent" means any person intrusted with possession of goods, wares and merchandise, or to whom the same are consigned, or who is possessed of any bill of lading, warehouse, wharfinger's or cove-keeper's receipt or order for the delivery of goods, wares and merchandise, bill of inspection of pot or pearl ashes, or any other document used in the course of business as proof of the possession or control of goods, wares and merchandise, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document, to transfer or receive goods, wares and merchandise thereby represented; and such person shall be deemed the possessor of such goods, wares and merchandise or bill of lading, warehouse, wharfinger's or cove-keeper's receipt or order for the delivery of goods, wares and merchandise, bill of inspection of pot or pearl ashes or other document as aforesaid, as well if the same are held by any person for him or subject to his control as if he is in actual possession thereof; 43 V., c. 22, sch. A.

What shall be
deemed
possession.

Warehouse
receipts may
be taken as
collateral
security.

2. The bank may acquire and hold any warehouse receipt or bill of lading as collateral security for the payment of any debt incurred in its favor in the course of its banking business; and the warehouse receipt or bill of lading so acquired shall vest in the bank, from the date of the acquisition thereof, all the right and title of

the previous holder or owner thereof, or of the person from whom such goods, wares and merchandise were received or acquired by the bank, if the warehouse receipt or bill of lading is made directly in favor of the bank instead of to the previous holder or owner of such goods, wares and merchandise :

3. If the previous holder of such warehouse receipt or bill of lading is the agent of the owner of the goods, wares and merchandise mentioned therein, the bank shall be vested with all the right and title of the owner thereof, subject to his right to have the same re-transferred to him, if the debt, as security for which they are held by the bank, is paid : When previous holder is an agent.

4. The bank shall not acquire or hold any warehouse receipt or bill of lading, to secure the payment of any bill, note or debt, unless such bill, note or debt is negotiated or contracted at the time of the acquisition thereof by the bank,—or upon the promise that such warehouse receipt or bill of lading would be transferred to the bank : but such bill, note or debt may be renewed or the time for the payment thereof extended, without affecting such security : When such security may be acquired.

5. The bank may, on shipment of any goods, wares and merchandise, for which it holds a warehouse receipt, surrender such receipt and receive a bill of lading in exchange therefor,—or, on the receipt of any goods, wares and merchandise for which it holds a bill of lading, it may surrender such bill of lading, store such goods, wares and merchandise, and take a warehouse receipt therefor,—or may ship them, or part of them, and take another bill of lading therefor : Exchange of warehouse receipt for bill of lading and vice versa.

6. Every bank which violates any provision of this section shall incur a penalty not exceeding five hundred dollars : Penalty for contravention ;

7. Every one is guilty of a misdemeanor and liable to imprisonment for a term not exceeding two years, who wilfully makes any false statement in any such And for making false statement.

receipt, acknowledgments or certificate, as is, in this section, mentioned. 34 V., c. 5, ss. 65, *part* and 67, *part*; —43 V., c. 22, s. 7, *part*; —46 V., c. 20, s. 9, *part*.

When warehouseman, &c., is also the owner.

54. If any person who grants a warehouse receipt or bill of lading is engaged in the calling, as his ostensible business, of keeper of a yard, cove, wharf or harbor, or of warehouseman, miller, saw-miller, maltster, manufacturer of timber, wharfinger, master of a vessel, or other carrier by land or by water or by both, curer or packer of meat, tanner, dealer in wool, or purchaser of agricultural produce, and is at the same time the owner of the goods, wares and merchandise mentioned in such warehouse receipt or bill of lading, every such warehouse receipt or bill of lading, and the right and title of the bank thereto and to the goods, wares and merchandise mentioned therein, shall be as valid and effectual as if such owner, and the person making such warehouse receipt or bill of lading, were different persons. 43 V., c. 22, s. 7, *part*.

Sale of goods on non-payment of debt.

55. In the event of the non-payment at maturity of any debt secured by a warehouse receipt or bill of lading, the bank may sell the goods, wares and merchandise mentioned therein, or so much thereof as will suffice to pay such debt with interest and expenses, returning the overplus, if any, to the person whom such warehouse receipt or bill of lading, or the goods, wares and merchandise mentioned therein, as the case may be, were acquired; but such power of sale shall be subject to the provisions hereinafter made. 43 V., c. 22, s. 7, *part*.

As to goods manufactured from articles pledged.

56. If any miller, maltster, or packer or curer of pork, grants a warehouse receipt for any cereal grains or hogs which are manufactured into flour or malt, pork, bacon or hams, respectively, while held thereunder, such warehouse receipt shall vest in any bank which is or becomes the lawful holder thereof, all the right and title to such

manufactured article, which such bank acquired, under such warehouse receipt, to the article described in such warehouse receipt, and so manufactured; and the bank shall continue to hold the same and all such right and title, for the same purposes and upon the same conditions as those upon which it previously held such material. 43 V., c. 22, s. 7, *part*.

57. All advances, made on the security of any bill of lading or warehouse receipt, shall give, to the bank making such advances, a claim for the repayment of such advances on the goods, wares and merchandise therein mentioned, or into which they have been converted, prior to and by preference over the claim of any unpaid vendor. 43 V., c. 22, s. 7, *part*.

Prior claim
of the bank
over unpaid
vendor.

58. No sale without the consent in writing of the owner of any timber, boards, deals, staves, saw logs or other lumber, shall be made under this Act until notice of the time and place of such sale has been given by a registered letter, mailed in the post office to the last known address of the pledger thereof, at least thirty days prior to the sale thereof; and no goods, wares or or merchandise, other than timber, boards, deals, staves, saw logs or other lumber, shall be sold by the bank under this Act without the consent of the owner, until notice of the time and place of sale has been given by a registered letter, mailed in the post office to the last known address of the pledger thereof, at least ten days prior to the sale thereof :

Notice to be
given before
sale of goods
pledged.

2. Every such sale of any article mentioned in this section, without the consent of the owner, shall be made by public auction, after a notice thereof by advertisement, stating the time and place thereof, in at least two newspapers published in or nearest to the place where the sale is to be made; and if such sale is in the Province of Quebec, then at least one of such newspaper shall be a newspaper published in the English language, and one other such newspaper shall be a newspaper published in the French language. 43 V., c. 22, s. 7, *part*.

Sale by auc-
tion after no-
tice.

No loan to be made on its own stock, but bank to have a lien on stock for overdue debts.

Transfer in case of sale.

Penalty for contravention.

Provision as to collateral security.

How collateral security may be dealt with.

59. The bank shall not make loans or grant discounts on the security of its own stock, but shall have a privileged lien, for any debt or liability for any debt to the bank, on the shares and unpaid dividends of the debtor or person liable, and may decline to allow any transfer of the shares of such debtor or person until such debt is paid; and, if such debt is not paid when due, the bank may sell such shares, after notice has been given to the holder thereof of the intention of the bank to sell the same, by mailing such notice in the post office to the last known address of such holder, at least thirty days prior to such sale; and, upon such sale being made, the president, vice-president, manager or cashier shall execute a transfer of such shares to the purchaser thereof in the usual transfer book of the bank,—which transfer shall vest in such purchaser all the rights in or to such shares which were possessed by the holder thereof, with the same obligation of warranty on his part as if he were the vendor thereof, but without any warranty from the bank or by the officer of the bank executing such transfer:

2. Every bank which violates any provision of this section shall incur a penalty not exceeding five hundred dollars. 43 V., c. 22, s. 8, *part*;—46 V., c. 20, s. 9, *part*.

60. Nothing in this Act contained shall prevent the bank from acquiring and holding, as collateral security for any advance made by the bank, or debt due to the bank, or for any credit or liability incurred by the bank to or on behalf of any person (and either at the time of the making of such advance, or the contracting of such debt, or the opening of such credit, or the incurring of such liability), Dominion, provincial, British or foreign public securities, or the stock, bonds or debentures of municipal or other corporations, except banks:

2. Such stock, bonds, debentures or securities may, in case of default to pay the debt for securing which they were so acquired and held, be dealt with, sold and con-

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veyed in like manner, and subject to the same restrictions as are herein provided in respect of stock of the bank on which it has acquired a lien under this Act ; but the right to so deal with and dispose of such stock, bonds, debentures or securities in manner aforesaid may be waived or varied by any agreement between the bank and the owner of such stock, bonds, debentures or securities, made at the time at which such debt has been extended, then by an agreement made at the time of such extension. 43 V., c. 22, s. 8, *part*.

Provision may be varied.

61. The bank shall not be liable to incur any penalty or forfeiture for usury ; and may stipulate for, take, reserve or exact any rate of interest or discount not exceeding seven per centum per annum, and may receive and take in advance any such rate, but no higher rate of interest shall be recoverable by the bank ; and the bank may allow any rate of interest whatever upon money deposited with it. 34 V., c. 5, s. 52.

No penalty for usury.

What interest may be allowed.

62. No promissory note, bill of exchange or other negotiable security, discounted by or indorsed or otherwise assigned to the bank, shall be held to be void, usurious or tainted by usury, as regards such bank or any maker, drawer, acceptor, indoser or indorsee thereof, or other party thereto, or *bona fide* holder thereof, nor shall any party thereto be subject to any penalty or forfeiture by reason of any rate of interest taken, stipulated or received by such bank, on or with respect to such promissory note, bill of exchange, or other negotiable security, or paid or allowed by any party thereto to another in compensation for, or in consideration of, the rate of interest taken or to be taken thereon by such bank ; but no party thereto, other than the bank, shall be entitled to recover or liable to pay more than the lawful rate of interest in the Province where the suit is brought, nor shall the bank be entitled to recover a higher rate than

No instrument to be void on ground of usury.

As to innocent holders. seven per cent. per annum ; and no innocent holder of

or party to any promissory note, bill of exchange or other negotiable security shall, in any case, be deprived of any remedy against any party thereto, or liable to any penalty or forfeiture, by reason of any usury or offence against the laws of any such Province, respecting interest, committed in respect of such note, bill or negotiable security, without the complicity or consent of such innocent holder or party. 35 V., c. 8, s. 2.

Collection fees.

63. The bank may, in discounting at any of its places of business, branches, agencies or offices of discount and deposit, any note, bill or other negotiable security or paper payable at any other of its own places or seats of business, branches, agencies or offices of discount and deposit in Canada, receive or retain, in addition to the discount, any amount not exceeding the following rates per centum, according to the time it has to run, on the amount of such note, bill or other negotiable security or paper, to defray the expenses attending the collection thereof, that is to say : under thirty days, one eighth of one per cent.—thirty days or over, but under sixty days, one-fourth of one per cent.—sixty days, and over, but under ninety days, three eighths of one per cent.—ninety days and over, one-half of one per cent. 34 V., c. 5, s. 53.

Agency fees.

64. The bank may, in discounting any note, bill or other negotiable security or paper, *bona-fide* payable at any place in Canada, different from that at which it is discounted, and other than one of its own places or seats of business, branches, agencies or offices of discount and deposit in Canada, receive and retain in addition to the discount, thereon, a sum not exceeding one half of one per centum on the amount thereof, to defray the expense of agency and charges in collecting the same. 34 V., c. 5, s. 54.

65. The bank may receive deposits from any person whomsoever, whatever is his age, status or condition in life, and whether such person is qualified by law to enter into ordinary contracts or not; and, from time to time, may repay any or all of the principal thereof, and may pay the whole or any part of the interest thereon to such person, without the authority, aid, assistance or intervention of any person or official being required, unless before such repayment the money so deposited in and repaid by the bank is lawfully claimed as the property of some other person,—in which case it may be paid to the depositor with the consent of the claimant, or to the claimant with the consent of the depositor: Provided always, that if the person making any such deposit could not, under the law of the Province where the deposit is made, deposit and withdraw money in and from a bank without this section, the total amount to be received from such person on deposit shall not, at any time, exceed the sum of five hundred dollars:

Deposits may be received from persons unable to contract.

Proviso: amount limited.

2. The bank shall not be bound to see to the execution of any trust, whether expressed, implied or constructive, to which any deposit made under the authority of this section is subject; and except only in the case of a lawful claim, by some other person before repayment, the receipt of the person in whose name any such deposit stands, or if it stands in the name of two persons the receipt of one, and if in the names of more than two persons the receipt of a majority of such persons shall be a sufficient discharge to all concerned for the payment of any money payable in respect of such deposit, notwithstanding any trust to which such deposit is then subject, and whether or not the bank sought to be charged with such trust (and with whom the deposit has been made), had notice thereof; and the bank shall not be bound to see to the application of the money paid upon such receipt. 35 V., c. 8, ss. 3 and 4.

Bank not bound to see to trusts in relation to such deposits.

RETURNS BY THE BANK.

Monthly
returns to
Government.

66. Monthly returns shall be made by the bank to the Minister of Finance and Receiver General in the form set forth in Schedule B. to this Act, and shall be made up and sent in within the first twenty days of each month, and shall exhibit the condition of the bank on the last juridical day of the month next preceding; and such monthly returns shall be signed by the chief accountant, and by the president, or vice-president or the director (or, if the bank is *en commandite*, the principal partner) then acting as president, and by the manager, cashier or other principal officer of the bank at its chief place of business:

Penalty for
not making up
monthly
returns in due
time.

2. Every bank which neglects to make up or to send in as aforesaid any monthly return required by this section of this Act, within the time thereby limited, shall incur a penalty of fifty dollars for each and every day, after the expiration of the time hereby limited during which the bank neglects so to make up or send in such return; and the date upon which it appears by the Post Office stamp or mark upon the envelope or wrapper enclosing such return for transmission to the Minister of Finance and Receiver General, that the same was deposited in the Post Office, shall be taken *prima facie*, for the purposes of this section, to be the date upon which such return was made up or sent in. 34 V., c. 5, s. 13;—43 V., c. 22, s. 4, *part*;—46 V. c. 20, s. 7.

Special
returns may
be called for.

67. In addition to the returns specified in the next preceding section, the Minister of Finance and Receiver General may call for special returns from any particular bank, whenever, in his judgment, the same are necessary to afford a full and complete knowledge of its condition. 43 V., c. 22, s. 4, *part*.

Transmission
of certified
lists of share-
holders to

68. Certified lists of the shareholders (or of the principal partners if the bank is *en commandite*), with their additions and residences, and the number of shares

they respectively hold, and the value at par of the said ^{Minister of Finance.} shares, shall be transmitted every year to the Minister of Finance and Receiver General, before the day appointed for the opening of the session of Parliament, and shall be by him laid before Parliament within fifteen days after the opening of the then next session; and such transmission shall be made by the delivery of such lists at the Department of Finance, or by registered post-letter, posted at such time that, in the ordinary course of the post, it may be delivered at the Department of Finance before the day appointed for the opening of the session :

2. Every bank which neglects to transmit to the ^{Penalty for neglect to transmit such lists.} Minister of Finance and Receiver General the lists mentioned in this section, within the time limited thereby, shall incur a penalty of fifty dollars for each and every day during which such neglect continues. 46 V., c. 20, s. 2.

69. The annual returns required by this Act shall ^{Annual returns.} be made up to the thirty-first day of December, in the year next preceding each session of Parliament. 46 V., c. 20, s. 12.

INSOLVENCY.

70. In the event of the property and assets of the ^{Liability of shareholders in case of insufficiency of assets.} bank being insufficient to pay its debts and liabilities, the shareholders of the bank shall be liable for the deficiency so far as that each shareholder shall be so liable to an amount, over and above any amount not paid up on his shares, equal to the amount of such shares. 34 V., c. 5, s. 58, *part*.

71. Any suspension by the bank of payment of any ^{Suspension for 90 days to constitute insolvency.} of its liabilities as they accrue, in specie or Dominion notes, shall, if it continues for ninety days, constitute the bank insolvent and operate a forfeiture of its charter or Act of incorporation, so far as regards the issue or re-issue of notes and other banking operations ; and

the charter or Act of incorporation shall remain in force only for the purpose of enabling the directors or other lawful authority to make the calls mentioned in the next following section of this Act and to wind up its business. 34 V., c. 5, s. 57.

Calls in such cases.

72. If any suspension of payment in full in specie or Dominion notes, of all or any of the notes or other liabilities of the bank, continues for six months, and if no proceedings are taken under any general or special Act for the winding up of the bank, the directors shall make calls on such shareholders, to the amount they deem necessary to pay all the debts and liabilities of the bank, without waiting for the collection of any debts due to it or the sale of any of its assets or property :

How such calls shall be made and enforced.

2. Such calls shall be made at intervals of thirty days, and upon notice to be given thirty days at least prior to the day on which such call shall be payable, and any number of such calls may be made by one resolution ; any such call shall not exceed twenty per cent. on each share ; and payment of such calls may be enforced in like manner as payment of calls on unpaid stock may be enforced ; and the first of such calls may be made within ten days after the expiration of the said six months :

Refusal to make calls under this section a misdemeanor.

3. Every director who refuses to make or enforce, or to concur in making or enforcing, any call under this section, is guilty of a misdemeanor, and liable to imprisonment for any term not exceeding two years, and shall further be personally responsible for any damages suffered by such default. 34 V., c. 5, s. 58, *part*, and ss. 63 and 67, *part*.

Calls under winding-up Act.

73. In the event of proceedings being taken under any general or special winding-up Act, in consequence of the insolvency of the bank, the said calls shall be made in the manner prescribed for the making of such calls in such general or special winding-up Act.

74. Any failure on the part of any shareholder liable to any such call to pay the same when due, shall operate a forfeiture by such shareholder, of all claim in or to any part of the assets of the bank,—such call and any further call thereafter being nevertheless recoverable from him as if no such forfeiture had been incurred. 34 V., c. 5, s. 58, *part.* Forfeiture for non-payment.

75. Nothing in the five sections next preceding contained shall be construed to alter or diminish the additional liabilities of the directors as hereinbefore mentioned and declared. 34 V., c. 5, s. 58, *part.* Liability of directors not diminished.

76. If the bank is *en commandite* and the principal partners are personally liable, then, in case of any such suspension, their liability shall at once accrue and may be enforced against such principal partners, without waiting for any sale or discussion of the property or assets of the bank, or other preliminary proceedings whatsoever, and the provision respecting calls shall not apply to such bank. 34 V., c. 5, s. 58, *part.* As to banks *en commandite*.

77. Persons who, having been shareholders in the bank, have only transferred their shares or any of them to others, or registered the transfer thereof within one month before the commencement of the suspension of payment by the bank, shall be liable to all calls on such shares, as if they had not transferred them, saving their recourse against those to whom they were transferred. 34 V., c. 5, s. 59, *part.* Liability of shareholders who have transferred their stock.

78. If the bank is *en commandite*, the liability of the principal partners and of the *commanditaires* shall continue for such time after their ceasing to be such as is provided in the charter of the bank, and the foregoing provisions with respect to the transfer of shares or calls shall not apply to such bank. 34 V., c. 5, s. 59, *part.* Liability if bank is *en commandite*.

79. The payment of the notes issued by the bank Notes to be

first charge on assets, and intended for circulation, then outstanding, shall be the first charge upon the assets of the bank in case of its insolvency. 43 V., c. 22, s. 12, *part*.

OFFENCES AND PENALTIES.

President,
etc., giving
undue preference to any
creditor,
guilty of a
misdemeanor.

80. Every one is guilty of a misdemeanor and liable to imprisonment for a term not exceeding two years who, being the president, vice-president, director, principal partner *en commandite*, manager, cashier or other officer of the bank, wilfully gives or concurs in giving any creditor of the bank any fraudulent, undue or unfair preference over other creditors, by giving security to such creditor or by changing the nature of his claim or otherwise howsoever, and shall further be responsible for all damages sustained by any person in consequence of such preference. 34 V., c. 5, ss. 61 and 67, *part*.

Making false
statement in
returns, etc.,
a misdemeanor, etc.

81. The making of any wilfully false or deceptive statement in any account, statement, return, report or other document respecting the affairs of the bank is, unless it amounts to a higher offence, a misdemeanor punishable by imprisonment for a term not exceeding two years; and every president, vice-president, director, principal partner *en commandite*, auditor, manager, cashier or other officer of the bank, who prepares, signs, approves or concurs in such statement, return, report or document, or uses the same with intent to deceive or mislead any person, shall be held to have wilfully made such false statement, and shall further be responsible for all damages sustained by such person in consequence thereof. 34 V., c. 5, ss. 62 and 67, *part*.

Unauthorized,
use of title
"Bank," etc.,
a misdemeanor.

82. Every person, firm or company assuming or using the title of "bank," "banking company," "banking house," "banking association" or "banking institution," without adding to the said designation the words "not incorporated," or without being authorized so to do by this Act, or by some other Act in force in that behalf, is guilty of a misdemeanor and shall incur

a penalty not exceeding one thousand dollars. 43 V., c. 22, s. 10;—46 V., c. 20, s. 8.

83. Every person or corporation, except a chartered bank, who issues or re-issues, makes, draws or indorses any bill, bond, note, cheque or other instrument, intended to circulate as money, or to be used as a substitute for money, for any amount whatsoever, shall incur a penalty of four hundred dollars, which shall be recoverable with costs, in any court of competent jurisdiction, by any person who sues for the same; and a moiety of such penalty shall belong to the person suing for the same, and the other moiety to Her Majesty for the public uses of Canada:

Penalty for
unauthorized
issue of notes
for circulation.

2. The intention to pass any such instrument as money shall be presumed, if it is made for the payment of a less sum than twenty dollars, and is payable either in form or in fact to the bearer thereof, or at sight, or on demand, or at less than thirty days thereafter, or is overdue, or is in any way calculated or designed for circulation, or as a substitute for money; unless such instrument is a cheque on some chartered bank, paid by the maker directly to his immediate creditor, or a promissory note, bill of exchange, bond or other undertaking, for the payment of money paid or delivered by the maker thereof to his immediate creditor, and is not designed to circulate as a substitute for money. 34 V., c. 5, s. 68, *part*.

What shall be
deemed such
notes.

NOTICES.

84. The several public notices by this Act required to be given, shall be given by advertisement in one or more of the newspapers published at the place where the head office of the bank is situate, and in the *Canada Gazette*. 34 V., c. 5, s. 69.

How notices
shall be given.

FUTURE LEGISLATION.

85. The bank shall always be subject to any general provisions respecting banks which Parliament deems necessary in the public interest. 34 V., c. 5, s. 71.

Bank subject
to any general
Act.

SPECIAL PROVISIONS AS TO CERTAIN BANKS.

How certain
banks may
come under
this Act.

86. This Act shall not apply to any bank in existence at the commencement of the session of the Parliament of Canada held in the forty-third year of Her Majesty's reign, which is not mentioned in schedule A to this Act (except the Bank of British North America, La Banque du Peuple and the Bank of British Columbia, to the extent hereinafter mentioned), unless the directors of such bank, by special resolution, apply to the Treasury Board to have the provisions of this Act extended to such bank, nor unless the Treasury Board allows such application; and upon publication in the *Canada Gazette* of such resolution, and of the minute of the Treasury Board thereon, allowing such application, such bank shall come under the provisions of this Act. 34 V., c. 5, s. 73;—43 V., c. 22, ss. 1 and 11.

What sections
shall apply to
Bank of B.
N. A.

87. The Bank of British North America, which, by the terms of its present charter, is subject to the general laws of Canada with respect to banks and banking, shall not issue or re-issue in Canada any note for a less sum than five dollars, or for any sum not being a multiple of five dollars; and any such note of the said bank outstanding shall be called in and redeemed as soon as practicable: and the provisions contained in the second, fourteenth, thirty-ninth, forty-first, forty-second, forty-fourth, fifty-second, fifty-third, fifty-fourth, fifty-fifth, fifty-sixth, fifty-seventh, fifty-eighth, fifty-ninth, sixtieth, sixty-first, sixty-second, sixty-third, sixty-fourth, sixty-fifth, sixty-sixth, sixty-seventh, sixty-eighth, sixty-ninth, seventy-ninth, eightieth, eighty-first, eighty-fourth and eighty-fifth section of this Act shall apply to the said bank; and those contained in the other sections of this Act shall not apply to it. 34 V., c. 5, s. 72;—35 V., c. 8, s. 3;—40 V., c. 54;—43 V., c. 22, s. 1;—46 V., c. 20, ss. 1 and 12, *part*.

88. All the provisions of this Act, except those contained in sections three, four, five, six, seven, eight, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, twenty-three, twenty-four, twenty-five, seventy, seventy-one, seventy-two, seventy-three, seventy-four, seventy-five, seventy-six, seventy-seven, seventy-eight, eighty-six, eighty-seven and eighty-nine, and so much of section nine, as is declared not to apply to the banks *en commandite*, shall apply to La Banque du Peuple: Provided, that ^{What provisions shall apply to La Banque du Peuple.} wherever the word "directors" is used in any of the sections which apply to the said bank, it shall be read and construed as meaning the principal partners or members of the corporation of the said bank; and so much of the Act incorporating the said bank or of any Act amending or continuing it as is inconsistent with ^{Inconsistent enactments repealed.} any section of this Act applying to the said bank, or which makes any provision in any matter provided for by the said sections, other than such as is hereby made, is hereby repealed. 34 V., c. 5, s. 75.

89. The provisions contained in the second, twenty-seventh, twenty-eighth, thirty-ninth, fortieth, forty-first, forty-second, forty-fourth, forty-fifth, forty-seventh, forty-eighth, forty-ninth, fiftieth, fifty-first, fifty-third, fifty-fourth, fifty-fifth, fifty-sixth, fifty-seventh, fifty-eighth, fifty-ninth, sixtieth, sixty-first, sixty-second, sixty-third, sixty-fourth, sixty-fifth, sixty-sixth, sixty-seventh, sixty-eighth, sixty-ninth, seventy-ninth, eightieth, eighty-first, eighty-fourth and eighty-fifth sections of this Act shall apply to the Bank of British Columbia: ^{What provisions shall apply to the Bank of B. C.}

2. The chief seat of business of the said bank shall, ^{Chief seat of business.} for the purposes of the several portions of this Act hereby made applicable to the said bank, be the office of the bank at Victoria, in the Province of British Columbia. 48-49 V., c. 83, ss. 1, 2, 3 and 4.

SCHEDULE A.

BANKS WHOSE CHARTERS ARE CONTINUED BY THIS ACT.

1. The Bank of Montreal.
 2. The Quebec Bank.
 3. La Banque du Peup^le.
 4. The Consolidated Bank.
 5. Molsons Bank.
 6. The Bank of Toronto.
 7. The Ontario Bank.
 8. The Eastern Townships Bank.
 9. La Banque Nationale.
 10. La Banque Jacques Cartier.
 11. The Merchants' Bank of Canada.
 12. The Union Bank of Lower Canada.
 13. The Canadian Bank of Commerce.
 14. The Mechanics' Bank.
 15. The Dominion Bank.
 16. The Merchants' Bank of Halifax.
 17. The Bank of Nova Scotia.
 18. The Bank of Yarmouth.
 19. The Bank of Liverpool.
 20. The Exchange Bank of Canada.
 21. La Banque Ville Marie.
 22. The Standard Bank of Canada.
 23. The Bank of Hamilton.
 24. The Halifax Banking Company.
 25. The Maritime Bank of the Dominion of Canada.
 26. The Federal Bank of Canada.
 27. La Banque d'Hochelaga.
 28. The Stadacona Bank.
 29. The Imperial Bank of Canada.
 30. The Pictou Bank.
 31. La Banque de St. Hyacinthe.
 32. The Bank of Ottawa.
 33. The Bank of New Brunswick.
 34. The Exchange Bank of Yarmouth.
 35. The Union Bank of Halifax.
 36. The People's Bank of Halifax.
 37. La Banque de St. Jean.
 38. The Commercial Bank of Windsor.
- 43 V., c. 22, *Schedule B*;—44 V., c. 9;—48-49 V., c. 84, s. 1.

SCHEDULE B.

Return of the liabilities and assets of the
on day of , A.D., 18

Capital authorized\$
Capital subscribed.....\$
Capital paid up.....\$
Amount of rest or reserve fund.....\$
Rate per cent. of last dividend declared..... per cent.

LIABILITIES.

1. Notes in circulation \$
2. Dominion Government deposits payable on demand
3. Dominion Government deposits payable after notice or
on a fixed day.....
4. Deposits held as security for the execution of Dominion
Government contracts and for insurance companies...
5. Provincial Government deposits payable on demand.
6. Provincial Government deposits payable after notice or
on a fixed day.....
7. Other deposits payable on demand.....
8. Other deposits payable after notice or on a fixed day
9. Loans from or deposits made by other banks in Canada,
secured.....
10. Loans from or deposits made by other banks in Canada,
unsecured.....
11. Due to other banks in Canada
12. Due to agencies of the bank or to other banks or agen-
cies in foreign countries
13. Due to agencies of the bank, or to other banks or agen-
cies in the United Kingdom
14. Liabilities not included under foregoing heads.....

\$

ASSETS.

1. Specie.....\$
2. Dominion notes.....
3. Notes of and cheques on other banks
4. Balances due from other banks in Canada
5. Balances due from agencies of the bank or from other
banks or agencies in foreign countries.....
6. Balances due from agencies of the bank or from other
banks or agencies in the United Kingdom.....
7. Dominion Government debentures or stocks.....
8. Provincial, British or foreign or colonial public securities
other than Canadian.....

9. Loans to the Government of Canada.
10. Loans to Provincial Governments.
11. Loans, discounts, or advances for which stock, bonds or debentures of municipal or other corporations, or Dominion, Provincial, British or foreign or colonial public securities other than Canadian, are held as collateral securities.
12. Loans, discounts or advances on current account to municipal corporations.
13. Loans, discounts or advances on current account to other corporations.
14. Loans to or deposits made in other banks, secured.
15. Loans to or deposits made in other banks, unsecured.
16. Other current loans, discounts and advances to the public.
17. Notes and bills discounted overdue and not specially secured.
18. Other overdue debts not specially secured.
19. Notes and bills discounted overdue and other overdue debts secured, by mortgage or other deed, on real estate or by deposit of or lien on stock, or by other securities.
20. Real estate, the property of the bank (other than the bank premises).
21. Mortgages on real estate sold by the bank.
22. Bank premises.
23. Other assets not included under the foregoing heads.

§

Aggregate amount of loans to and liabilities, direct or indirect, of directors, and firms or partnerships in which they or any of them have any interest, §

Average amount of specie held during the month, §

Average amount of Dominion Notes held during the month, §

I declare that the above return has been prepared under my directions and is correct according to the books of the bank.

E. F., Chief Accountant.

We declare that the foregoing return is made up from the books of the bank, and that to the best of our knowledge and belief it is correct, and shows truly and clearly the financial position of the bank; and we further declare that the bank has never, at any time during the period to which the said return relates, held less than forty per cent. of its cash reserves in Dominion notes.

(Place) this day of

A. B., President.

C. D., General Manager.

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THE
LAW AND PRACTICE
OF
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PART FIRST.

COMMENTARY ON THE BANK ACT.

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COMMENTARY ON THE BANK ACT.

CHAPTER I.

ORGANIZATION.

SECT. 1.—INTRODUCTION.

2.—ACTS OF INCORPORATION.

3.—GENERAL MEETINGS.

4.—BY-LAWS.

SECT. 1.—INTRODUCTION.

The exclusive power to legislate on all matters relating to the incorporation of Banks, the regulation of Banking and the issue of paper money is vested by the British North America Act of 1867 in the Federal Parliament. The Bank Act is, therefore, a Dominion Statute, and Banking Corporations derive their charter rights and privileges from the Federal power. It would appear, however, that while the Dominion Parliament may grant a charter to a Bank, authorizing it to transact business within the purposes of its organization anywhere in the Dominion, it is for the provinces to decide whether they will admit it to such privileges, or enable it to enforce such contracts as may be entered into. Any provincial legislature is competent in its discretion to exclude a Dominion corporation from entering into contracts within the limits of the Province, or may exact whatever security it would deem to be reasonable for the performance of its contracts. This principle was acknowledged in the judgments

rendered by the Ontario Court of Appeals in March and May, 1879, concerning certain insurance companies (1), and is applicable by analogy to Banking Corporations, the same question being involved, namely, the right of a corporation to transact business in foreign jurisdictions. In practice, however, this right is universally recognized, not indeed as being inherent, but rather as bestowed, and this is due to the good will and sufferance of each particular Province. The interest which every place possesses in encouraging within its borders every kind of business not inconsistent with public policy is its sure guarantee.

At common law, the right of Banking pertains equally to every member of the community, but its free exercise can be restricted by legislative enactments emanating from the proper source, the evident effect of restraining acts being to secure the public welfare and safety from the inroads of incompetent and irresponsible men. This common law right has not, however, been restricted by the legislature, except in so far as the provisions of the Bank Act may be construed as a restraint, in making the unauthorized use of the title of Bank or its equivalent a misdemeanor subject to heavy penalty (2). It cannot be said to take away any of the privileges inherent in the business of Banking, being a simple prohibition denying the right to use as the firm name a word, or set of words, which by general acceptance conveys the idea of incorporation, and consequently of extra privileges conferred through motives of public interest. The provisions of the succeeding paragraph of the Act may also seem at first sight to be of the nature of a restraint, but when we consider that the power to issue and circulate notes or paper certificates of any kind, intended to circulate as money, is the exclusive prerogative of sovereignty, it will be apparent that such a right has never been accorded to individual bankers. If such were the case the exclusive power conferred upon the Federal Government over the currency would be wholly ineffectual,

(1) See Todd, *Parl. Gov't in the Colonies*, p. 378.

(2) Section 82.

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In fact, so far from its being an individual and common right, it would appear that the sovereign holds the power to coin money as an inalienable prerogative for the benefit of the state and subject to its laws, the public faith being surety for the money. (1)

The incorporation of Banks is in itself, however, a restriction on private Banking, for with the numerous connections of joint-stock associations, ramified through all ranks of society, the days of the private Banker may be considered as almost numbered. A few of the most eminent may continue to flourish, maintaining their hereditary and long established connections for some time to come, but most of the new business will go to chartered corporations. Every case of failure and mismanagement of a private Banker tends to shake the credit of the majority of the remainder. But no failure of a joint-stock Bank can destroy the system, because however much the shareholders may suffer, the customers and depositors seldom suffer. To discuss the comparative merits of private and joint stock Banking is not within the province of this commentary. It is sufficient to know that business of this nature is free to all within certain limits, and the public wants will maintain in existence a sufficient supply of representatives of the former class, if equal security can be assured.

In granting acts of incorporation to Banks the manifest intention of the Legislature is to afford additional accommodation to the business community, to provide safe institutions of deposit for the accumulations of the public, and to facilitate mercantile transactions by providing safe credits and a circulating medium. The restrictions placed upon the extra powers thus given are enacted with peculiar distinctness, and must be followed in every particular or forfeiture of the charter will ensue.

The law of Banking forms part of the *lex Mercatorix* or Law Merchant, so called from being founded on the custom of merchants.

(1) See Doutre on the B. N. A. Act, p. 168.

The mercantile Law of England is in point of fact an edifice erected by the merchant with comparatively little assistance either from the courts or the legislature. The former have, in very many instances, only impressed with a judicial sanction, or reduced proper and reasonable consequences from those regulations, which the experience of the trader, whether borrowing from foreigners or inventing himself, had already adopted as the most convenient. The latter, wisely reflecting that commercial men are notoriously the best judges of their own interests, has interfered as little as possible with their vocations, has shackled trade with few of those formalities and restrictions which are mischievous, if only on account of the waste of the time occupied in complying with them. The mercantile Law of England is, perhaps, of all laws in the world, the most completely the offspring of usage and convenience, the least fettered by legislative regulations. (1)

The legislature, in framing the present Bank Act, has not attempted to define the business of Banking, nor yet to explain the ordinary rules which regulate its operations. The forty-fifth section confers upon banking associations the power to engage "in such trade generally as appertains to the business of banking," of which the dealing in gold and silver bullion and bills of exchange, and the discounting of promissory notes and negotiable securities are declared to form part. The court is left to decide wherein consists the business of banking in its widest sense, and by it this will be determined in accordance with the custom of merchants.

SECT. 2.—ACTS OF INCORPORATION.

Any five or more persons, who desire to associate themselves for the purpose of carrying on the business of banking in the form of a corporation aggregate must proceed by a petition to the Federal legislature, setting forth the pro-

(1) *Smith's Mercantile Law*. Introduction.

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posed name of the bank, the place where its chief office is to be situate, the amount of capital stock, and the number and value of each share. Although it is not specially enacted that five shall be the minimum number of petitioners, as is the case in ordinary Joint Stock Companies, it is conceived that the section of the Bank Act which requires that the number of directors shall not be less than five is equivalent to such enactment. The object of the petition having thus directly come under the scrutiny of the authorities, it rests with them either to refuse or to issue the desired Act of Incorporation.

The special Act of Incorporation, if granted, declares the amount of capital stock, the value of each share, the name of the bank, and the place where its chief office is to be situate, as declared in the petition (1). Provision is also made for a temporary Board of Management.

HEAD OFFICE.

The object of fixing and making public the place where the head-office or legal domicile of the Bank is situated is to determine the jurisdiction to which the bank is amenable, and the place where service of any notice or legal process may be made. In other words the main object of the provision is the protection of the creditors of the Bank, affording such information in this respect, as may at any future time be required in enforcing obligations, which the company in the course of its dealings may have incurred.

The Bank, however, may open branches and agencies and offices of discount and deposit, and may transact business at any place or places in Canada (2), subject to the approval of the legislature having jurisdiction in the province in which the agencies are opened. Assent and recognition will be considered as having been given if, by law, no restraint is put upon the opening of such agencies. A banking corporation must be held to reside in the town where its principal office

(1). Section 5.

(2) Section 46.

is as a local inhabitant. Its residence depends not on the habitation of the shareholders, but on the official exhibition of legal and local existence.

NAME.

The corporate name of the Bank will also be provided for in the charter, being that in which all suits for or against the Bank may be had. A corporation being a fictitious person created by special authority, and endowed by that authority with a capacity to acquire rights and incur obligations, requires a name in order that its individuality may be established. The legislature is to be the judge as to the propriety of the name recommended by the petitioners, and it will take all necessary precaution to avoid granting a title which through confusion with one already in use may lead to serious misapprehension.

It is doubtful whether the legislature would authorize the use by a banking corporation of any name which would lead the general public to infer that it occupied the position of a State Bank. In selecting a name, therefore, the promoters should avoid suggesting any word, or set of words, which might convey that impression. The title "Bank of Canada" may be instanced as one coming within the above conjecture.

Though partnerships are at liberty to change their firm name or style, yet after a bank has been incorporated by a name set forth in the Act of Incorporation, such bank has not the right or power to change its name. The identity of name is the principal means for effecting that perpetuity of succession with members frequently changing which is an important purpose of incorporation, and the corporate name can be changed only by the same power by which the corporate body has been created.

CAPITAL STOCK.

Of all the provisions set forth in the Act of Incorporation, the most important is that fixing the amount of stock which

is to constitute, for the time being at least, the capital fund. By it the public are enabled to judge of the amount of credit of which the bank is worthy, and the extent to which it may be safe to go in dealing with it. It will be necessary however for the public to keep well in view the difference between the nominal capital and that which is actually paid in. The unimpaired paid-up capital fixes the limit as to the amount of notes which the bank is authorized to put in circulation.

In making use of the word capital it may, perhaps, be well to note, that in its operations at least, the actual *capital* of the bank may be many times the amount of its paid-up capital stock. Viewing from an economic point of view the question of capital we will find that it is defined as "any economic quantity used for the purpose of profit" (1), and that economic quantities are of three distinct species, symbolized by the terms *money*, *labor*, and *credit*.

The actual capital of the Bank is, therefore, the amount of its paid-up capital, the amount of money received for its notes in circulation and for its bills of exchange drawn on time, the amount of funds held on deposit, and the amount of undistributed profit. The capital stock paid in thus forms but a small proportion of the earning power of the Bank, and while it may be taken as the basis of credit, it must never be considered as constituting the source whence all profit is to be derived.

The nominal capital of an association formed on the principle of limited liability, and dependent in a great degree on credit, should be considerably greater than the immediate necessities the corporation require, as the balance remaining uncalled will, if the shares are in the hands of substantial holders, be a sufficient security for the creditors. This security is further enhanced by the double liability clause (2).

The capital stock of the Bank, as fixed by the charter, may be increased from time to time by the shareholders at

(1) Macleod on Banking vol. 1. p. 48.

(2) Section 70.

any annual general meeting or at any general meeting specially called for that purpose; and such increase may be agreed on by such proportions at a time as the shareholders shall determine, and shall be decided by the majority of the votes of the shareholders present at such meeting in person or represented by proxy (1). When the increase is thus decided upon the sanction of the Federal authority is not specially required. Although a variance from the original franchise, it is a variance authorized by the terms creating the franchise.

The capital stock of the Bank, however, may not be reduced by the shareholders without special authority, in the form of an amendment to the charter. The power, thus to diminish the security afforded to creditors and the public in general, is justly reserved by the Legislature as guardian of the public interest. When, therefore, the capital stock of the Bank is impaired, owing to heavy and unexpected losses, and the payment of dividends suspended (2) in consequence, a petition to the legislature is imperative, which body, if it deem the proposed measure advisable, will by the necessary enactment give legal authority to the desired reduction. The liability of holders to pay up in full at the original value any shares held by them and unpaid or not fully paid-up will not be diminished. Although the value of each share may be reduced, let us say one half, from one hundred to fifty dollars, or the number of shares reduced in like proportion, original shareholders still remain liable for any amount unpaid on the original stock. This liability is usually provided for in the amending Act.

It is conceived that the legislature would not sanction a reduction so great as to nullify the provision of section six, which makes a bona fide subscribed capital of at least five hundred thousand dollars a condition precedent to the enjoyment of the corporate franchise.

(1) Section 7.

(2) Section 27.

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SHARES.

The division of the capital into shares is one of the most striking features of a company organization, as distinguished from an ordinary partnership. It is this which enables all the world to contribute to its capital fund, by which its membership may undergo daily alteration without any derangement of its corporate functions, and which gives generally that elasticity to a company which forms its chief advantage. The amount of each share in banking corporations is usually placed at one hundred dollars. That amount is sometimes reduced to fifty, or even twenty-five dollars, later on in the existence of the Bank. Shareholders consider it of greater benefit for them to receive the regular semi-annual dividends, even if on a reduced share, to no dividend at all, and where the capital is even three-quarters lost the Bank may in time partly make good the reduction, besides paying its regular dividends.

Each shareholder in the Bank shall, on all occasions on which the votes of the shareholders are to be taken, have one vote for each share held by him for at least thirty days before the time of meeting. Provided always that he has paid one instalment of at least ten per cent. within thirty days after the date of his subscription (1), and all calls since become due and payable.

PROVISIONAL DIRECTORS.

In addition to these provisions and for the purpose of organizing the proposed Bank, and of raising the amount of its capital stock, a provisional Board of directors, from five to ten in number, are named in the Act of Incorporation, who are authorized to open stock books, after giving due public notice, in order to record the signatures and subscriptions of such persons as desire to become shareholders of the Bank. Until the first general meeting of the company the persons named as provisional directors manage the affairs of the

(1) Section 19.

company : and so soon as five hundred thousand dollars of the capital stock is subscribed for, and at least one hundred thousand dollars paid up, they are required to call a general meeting of its members for the election of Directors and the further organization of the company, paying due regard to the delays and other formalities precedent to such meeting, provided for by the charter itself. These delays and formalities ordinarily take the form of a public notice, published for at least four weeks previous to the holding of such meeting in a newspaper published at the place where the head office is situated. No period is fixed within which such first meeting must be held, but it should be called as soon as convenient after the provisions of the Act are complied with regarding the stock paid up.

At the first meeting thus called, the shareholders of the Bank who have paid all calls made by the provisional Directors which are then due and payable, and attend the meeting in person, or are represented by proxy in the person of other shareholders present, proceed with the organization of the Bank, and the enactment of by-laws for its regulation and government.

From the time of its incorporation, the Bank will have come under the provisions of the Bank Act, and the method of procedure to be followed at such meeting will be that provided for by the legislature.

SECT. 3.—GENERAL MEETINGS.

The general meetings of a Bank may be divided into two kinds, viz :—Ordinary and Extraordinary.

The former are the regular annual meetings of the shareholders, convened for the annual election of Directors, for receiving the annual report, and for the consideration of matters in general.

The latter are those which are convened at any time, at the usual place of meeting, for the transaction of special

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business, unforeseen or not provided for at the ordinary general meetings.

All extraordinary or special general meetings must be called by notice, given at least six weeks previous to the day appointed, which must specify the object to consider which the shareholders are being called together (1). A publication of the notice must be made in one or more newspapers published at the place where the chief office is situated, and also in the *Canada Gazette* (2).

The Directors, or any four of them (3), may at any time convene a special general meeting; and as a rule the Board will be the conveners. Occasions, however, may arise when the Directors may refuse to call a meeting for the special consideration of a subject, which may be deemed by the shareholders of vital importance. Such an occasion might be the proposed removal of the President, Vice-President, or other Director of the Bank for mal-administration or other specific and apparently just cause. In case of such refusal, any number not less than twenty-five of the shareholders, who are together proprietors of at least one-tenth of the paid-up capital stock of the Bank, by themselves or by their proxies, may call such meeting by giving due notice (4).

The ordinary general meetings are called by the Directors, and must be held on the day appointed by the charter or by any By-Law of the Bank, and at such time of the day, and at such place where the head office of the Bank is situated, as the majority of the Directors for the time being appoint (5). Public notice, as in the case of special meetings, is required, and must be given at least four weeks previous to the meeting, by a like publication. A question might arise as to whether any special business may be transacted at the annual general meeting without giving a further notice of two weeks. And whether the notice of such annual meeting should specify the special business, if any, to be transacted.

(1) Section 11.

(2) Section 84.

(3) Section 11.

(4) Ib. 11.

(5) Section 12.

Such extra notice, and any such specification we opine is not necessary. The question of increasing the capital stock, one of vital importance to the shareholders generally, would, if suddenly brought up at an annual general meeting, be a question somewhat of a special nature, and yet the Act provides for its consideration at either an annual general meeting, or at a general meeting specially called for that purpose (1).

The Act does not specify the number which shall constitute a quorum for the transaction of business at any general meeting, and in the absence of special provision any number, however small, is considered by law as constituting a quorum.

The meeting being ready for the transaction of business, the President of the Bank, if present, is the natural chairman of the meeting. If he is absent, a chairman will be chosen from among the shareholders present, in the ordinary manner. The rules governing the deliberations of the meeting are the same as those governing the proceedings of deliberative assemblies generally.

The chairman elected to preside at any meeting may vote as a shareholder, but will not have a second vote ex-officio except there is a tie, in which case he will have a casting vote(2). This casting vote, however, may not be used to decide the election of a Director (3); for it is provided that when two or more persons at any election have an equal number of votes, and the election or non-election of one or more of such persons as a Director or Directors depends on such equality, then the Directors who have a greater number, or the majority of them, determine which of the persons for whose election there has been a tie in the voting shall be considered elected (4).

All questions, proposed for the consideration of the shareholders of the Bank at any meeting, shall be determined by a majority of votes taken by ballot (5), and every shareholder shall have one vote for each share held by him at least thirty

(1) Section 7.

(2) Section 10, sub-section 2.

(3) *Ib.*

(4) Section 12, sub-section 4.

(5) Section 10., sub-sections 2 and 4.

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days before the time of meeting, upon which he has paid all calls made by the Directors which are then due and payable (1). In making calls it is usual to stipulate in the notice that the call will be due and payable on and after a certain day, and therefore until such day has passed a shareholder will not be affected if the day of meeting should intervene.

If two or more persons are joint holders of shares, any one of such joint holders may be empowered by letter of attorney from the other joint holder or holders, or a majority of them, to represent the said shares and vote accordingly (2).

Shareholders are entitled to tender their votes by proxy (3), a right which is not recognized by the common law. The object of this privilege is, clearly, to allow those who are unable to be present at a general meeting, either from sickness, distance, or any other cause, to exercise through or by means of others the rights which their shares give them of influencing the affairs of an institution in which their fortunes are involved. But all proxies must be held and voted upon by shareholders present at the meeting, and no manager, cashier, bank clerk or other subordinate officer of the Bank may act as proxy. Nor indeed can any manager, cashier, bank clerk or other subordinate officer of the Bank, who is at the same time a shareholder, record a vote either in person or by proxy (4). It has been held that the President, not being an officer of the Bank, may vote by proxy at the annual meeting of Directors (5). So also may he vote on shares of which he may be the holder. The appointment of a proxy to vote at any meeting, in order to be valid for that purpose, must have been made or renewed in writing within three years next preceding the time of such meeting (6). This provision has the effect of preventing shareholders from making use of old proxies, which may have been granted for a special purpose and their cancellation neglected.

(1) Section 13.

(2) Section 10, sub-section 3.

(3) Section 10, sub-section 1.

(4) Section 10.

(5) *Regina v. The Bank of Upper*

Canada, 5 U.C.Q.B., 338 (1849).

(6) Section 14.

The question has arisen as to the power of trustees to vote on stock held by them in trust, and of which they are the mere nominal holders. Where the trustees acted as such for the corporation, itself holding stock, which had reverted to the corporation in pledge or payment, it was held that such stock could not be voted upon, (1). It would indeed be a strange holding of the law if a company should be allowed to procure stock in any shape which its officers might make use of in an election to secure themselves against the possibility of removal.

Where a clear case of hypothecation can be shown, there is no doubt but that the pledger of the stock is the one entitled to vote thereon. The possession may well continue with him, consistently with the nature of the contract, and the stock remains in his name. Until the pledge is enforced, the title to the stock made absolute in the pledgee, and the name changed on the books, the pledger should be received to vote (2).

While stock stands in the name of a person on the books of a corporation he has a right to vote thereon, even although he has become bankrupt, and his property by operation of law vested in his assignee.

The mere circumstance that improper votes are received at an election will not vitiate it. The fact must be affirmatively shown that a sufficient number of improper votes were received for the successful ticket to reduce it to a minority if they had been rejected, or otherwise the election will stand (3).

Where votes rejected by scrutineers at an election of directors would if received have elected a certain ticket, and are adjudged to have been erroneously rejected, the only remedy is to set aside the election. The court, in such a case, has not the power to declare the ticket successful for which the votes would have been cast had they been received.

(1) Angell & Ames, Corp. 3rd. Am. Ed. p. 98.

(2) Angell & Ames, Corp. p. 99.

(3) Idem, p. 101.

SECT. 4.—BY-LAWS.

At the first, or any annual general meeting, or at any subsequent general meeting specially called for the purpose, the shareholders may regulate by by-law any or all of the following matters incident to the management and administration of the affairs of the Bank (1). That is to say:—

1. *The number of Directors and the quorum thereof.*—The power of the shareholders to determine the number of the Board of management and its quorum is greatly curtailed by the Act. A by-law which would provide for a board of less than five members, or for one of more than ten, would be invalid (2). Nor can any number less than three constitute a quorum (3).

2. *The qualification of Directors.*—A person to act as Director in a Banking corporation must be the *bona fide* owner of a certain number of shares as a guarantee of his interest in its affairs. This number will vary according to the paid-up capital of the bank. When such capital is one million dollars or less, the value of shares to be held by any director must not be less than three thousand dollars; and where the paid-up capital is over one million dollars, but does not exceed three millions, he must hold at least four thousand dollars of stock. For any amount above three million dollars of paid-up capital the qualification is five thousand dollars of stock (4). While this is the smallest amount required by the act, it rests with the shareholders whether or not to accept this minimum qualification. They have a perfect right to enact that the qualification as to the number of shares shall be increased to any extent that may seem to them desirable.

If a person be not qualified according to the by-laws of the Bank at the time of his election, the whole transaction will be null, although a sufficient number of shares be after-

(1) Section 9.

(2) *Ib.*

(3) Section 9, Sub-section 2.

(4) Section 16.

wards allotted to him in order to qualify him for the position. It is not necessary, however, that he should hold these shares or any fixed period, prior to the election unless the by-laws so require, but he must continue to possess them during the full term of his office (1), and any by-law to the contrary will be void in effect. Other qualifications are left to the discretion of the shareholders, with the single exception that it is not within their power to appoint as director any shareholder not a natural-born or naturalized subject of Her Majesty (2).

3. *The method of filling up vacancies in the Board of Directors whenever the same occur during each year.*—The non-filling of a vacancy, through the absence of any by-law to that effect or other cause, will not vitiate the acts of a quorum of the remaining directors (3). Should the vacancy have occurred in the office of the President or the Vice-President, the directors at the first meeting after completion of their number shall, from among themselves, choose a president or a vice-president, who shall continue in office for the remainder of the year (4). It would seem from the subsection above quoted that a vacancy created in the office of president or vice-president cannot be filled until the directors constitute a full board as fixed by the by-laws.

4. *The time and proceedings for the election of Directors in case of failure of any election or the day appointed for it.*—A particular day is generally appointed by the incorporating act for the election, annually, of the principal officers of the corporation. This is known as the charter day, and is usually fixed with so much certainty that no doubt can arise. The majority of the Banks subject to the provision of the present Act have not had any particular day fixed by their several acts of incorporation. A by-law passed by the shareholders has, as a rule, appointed the day of meeting.

The failure of election or any day when it should be made

(1) Section 9, sub-section 4.

(2) Section 12.

(3) Ib. sub-section 5.

(4) Ib.

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will not dissolve the corporation, and the Directors then in office shall so remain until a new election is made in the manner provided by the By-Laws (1). The proceedings on the day so fixed will be in accordance with the provisions of the Bank Act.

It would seem, therefore, that the clause providing that Directors should be chosen annually is only directory, and does not determine the office at the end of the year after election, but that the persons legally elected may continue in office *until removal*.

5. *The remuneration of the President, Vice-President and other Directors.*—The Directors are entitled to liberal remuneration for the time and thought they devote to the affairs of the Bank. In the absence of a by-law granting remuneration, however, Directors cannot, from the nature of their position alone, lay claim to any remuneration, however arduous may have been their duties. They occupy the position, not of servants, but of managers and trustees. But where a Director renders services under a resolution of appointment which does not specify his remuneration, he may recover the reasonable value of such services—for example, he may be appointed the attorney of the Bank or act as arbitrator in a disputed claim. It is usual and expedient to settle the matter of remuneration at the first general meeting. It has been held that there is no presumption that such fees are to be paid out of the profits only, and that where no profits were made they could remunerate themselves out of the capital. Although Directors are not entitled to recover remuneration, where it has not been provided for, they are entitled to indemnity for losses and expenses incurred in discharge of their duties.

6. *The closing of the transfer book during a certain time not exceeding fifteen days before the payment of each semi-annual dividend.*—The object of closing the transfer books is to enable the officers of the Bank to apportion the dividend, declared by the Directors for the half year, without being

(1) Section 15.

trammelled by daily use of the books by transferring shareholders. It also serves to establish the names of the then holders of the Bank stock to whom the declared profit is to be paid.

7. *The amount of discount or loans which may be made to Directors.*—Nothing, perhaps, has been a more fruitful source of disaster to Banks than the tendency in Directors to speculate, either directly or by the medium of others, with the funds under their control. Having extraordinary powers with regard to the funds of the bank, and being entrusted with these funds for the furtherance of the object for which the Bank was formed, it is always well to place some restriction on the use which they may make of these funds for the furtherance of private objects. According to the Bank Act, it is necessary for Directors to mention in the monthly return to the Government the aggregate amount of loans to and liabilities direct or indirect, of Directors, and firms or partnerships, in which they or any of them have any interest. The shareholders are, of course, presumed to take monthly cognizance of these returns, and may at any time limit the amount of individual loans to Directors by calling a special meeting for that purpose in the manner provided by the Act. It is we think rather unusual for a By-Law of this nature to be passed in Canada, the Directors of our Banks being as a rule the largest holders of the Bank stock, and consequently the most interested in preventing any member of their board from involving the Bank in loss. The severe penalty evoked by the law, for the making of any wilfully false or deceptive statement in the government returns, will always serve to protect the shareholders, and will give them an opportunity of providing, at the first alarm, for the non-repetition of a precarious loan. According to the organic law, under which the National Banks in the United States come into existence, it is especially enacted that loans to any one person shall never exceed one-tenth of the amount of capital stock; did such a provision find expression in our law, we might be spared the unfortunate losses which more than once have been the more or less immediate cause of insolvency.

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8. *The amount of discounts or loans to any one firm or person, or to any shareholder or to corporations.*—The remarks which we have made in considering the previous by-law apply with equal force to the present. The monthly returns require the directors to make known the amount of loans, discounts, or advances to (A) municipal corporations, (B) other corporations, and (C) to other Banks, made with or without security. Should the directors at any time prove lax in their duties to the shareholders, and make excessive loans to any person or persons or to corporations, the shareholders may bring them to a knowledge of their proper duties by passing a By-Law at any time, at a general meeting or a special meeting called for the purpose in the manner provided by the Act, limiting the loans which they may make to parties considered irresponsible by the shareholders.

CHAPTER II.

MANAGEMENT.

- SECT. 1.—BOARD OF DIRECTORS. GENERAL FUNCTIONS.
2.—PRESIDENT. DUTIES AND POWERS.
3.—LIABILITY OF BOARD FOR MISMANAGEMENT.

SECT. 1.—BOARD OF DIRECTORS—GENERAL FUNCTIONS.

It is customary in the incorporating act to confer upon the directors in broad phrascology the general power to conduct and manage the corporate business. This language is practically only a recognition of the functions which the board would be entitled and called upon to exercise by the rules of the common law, and does not operate to engage those functions or to designate them with any greater particularity. Nor can the duty thus conferred be construed as a requisition upon the directors to undertake the performance, in person, of all the acts called for by the daily routine of the business of the Bank. It extends to such matters only as are usually and conveniently allotted to the charge of directors in the banking business. Some such acts they must perform, others they may perform. But the obligation is measured by an uniform usage prevailing among banks universally. Their personal execution may be restricted to the matters thus designated, unless others be specifically named or added in the law. Besides a variety of specific acts which they must initiate or wholly do, this uniform usage imposes upon them the general superintendence and

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active management "of the corporate stock, property, affairs and concerns." They are bound to know all that is done, beyond the merest matter of routine; and they are bound to know the system and rules arranged for its doing. For this purpose the books, correspondence and funds of the Bank are at all times subject to their inspection (1).

POWER OF DELEGATION.

So although it has been said that powers of a public character given by the legislature to any body of individuals can never be sub-delegated by the recipients, yet this doctrine has never been allowed to prohibit bank directors from appointing agents and endowing them with sufficient powers for executing the resolutions of the board and carrying on, without specific authority in each individual case, the ordinary transactions of daily business.

Thus the directors may appoint as many officers, clerks and servants for carrying on the business of the Bank, and with such salaries and allowances as they consider necessary; and they may also appoint a director or directors for any branch of the Bank (2).

So in like manner they may delegate to a committee of their own number power to mortgage real estate of the corporation, including as a necessary implication power to execute and deliver the ordinary proper instruments (3). Although dealings in real estate are of the most dignified and formal character of any dealings in the eye of the law, yet general supervision even of these satisfies the duty of the board. All beyond this may be delegated. They may empower the president alone, or the president and cashier conjointly, to borrow money on behalf of the Bank, to indorse its promissory notes, to obtain discounts for its use; these powers also including the power to make delivery of the paper thus negotiated.

It seems also that these powers may be conferred not only

(1) Section 37.

(2) Section 18.

(3) *Burrill v. Nahant Bank*, 2 Met. 163.

by a special vote with a view to a single occasion, but also by a general resolution looking to their frequent exercise on various occasions (1). But votes of this broad nature, unless very cautiously indulged in, are likely often to be improper and in some degree unsafe. For if they appear to go too far in throwing within the discretion of others the decision of weighty matters covering a wide ground of responsibility, they would amount to an effort in a measure to delegate the "management" of the business of the Bank. To this extent the board of directors cannot go. Within reasonable and moderate limits, so narrow that their general supervision must practically cover all that their delegates can do within these limits, they may confer powers by a general resolution, which may be valid for an indefinite period and for any number of separate transactions. But authority so large as to transfer in an important degree the control of the corporate affairs they cannot confer.

DIRECTORS HAVE SOLE POWER TO MAKE DISCOUNTS.

Thus the making of discounts is an inalienable function of the directors. They cannot part with it, or invest any officer or officers with it. It rests in them alone and exclusively. It is a power of that degree of vital importance that it cannot be taken out of the policy of the general principle that powers of a public nature, given by the legislature, cannot be sub-delegated (2). The legislature imposes upon the board the duty of taking charge of all those matters of business upon the wise and skilful conduct of which the prosperity of the corporation, and the safety of persons dealing with it depends. This duty they cannot shift in whole or in part upon others, and it covers no department of banking business more unquestionably than the making of loans and discounts.

(1) *Ridgway v. Farmers' Bank*, 12 Serg. and R. 256; *Merrick v. Bank of the Metropolis*, 8 Gill. 59; *Fleckner v. Bank of the United States*, 8 Wheat. 338.

(2) *Lyon v. Jerome*, 26 Wend. 485.

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HOW FAR THIS POWER MAY BE DELEGATED.

The board may, however, give the financial officer of the Bank by a single resolution power to make a considerable number of discounts or loans, provided they be requested. But this single resolution must name the person or persons to whom the loans may be made, the aggregate sum which they must not exceed; the time; and such other particulars as the directors may deem of moment. Thus in fact though many separate acts may be authorized by this one vote, yet nothing is really done beyond the supervision of the directors, or without the active exercise of their discretion. They may order the cashier to let A. have such loans as he shall wish, in such sums and at such times as he shall ask, within a certain period, up to the amount of a designated sum, to run for specified times, at rates of interest named, and upon designated conditions concerning indorsers or collateral security. This does not leave each individual discount made to A. to be passed upon by the directors; yet in fact no discount is made to him by any official authority other than that of the board or at the substantial discretion of any person save the directors.

EXECUTORY FUNCTIONS MAY BE DISCHARGED BY AGENTS.

The ordinary executory functions of the various officers of the Bank are not necessarily affected by the statutory delegation of the management of all corporate affairs to the board. Management is not identical with execution and does not intend execution. Checks are drawn, notes and bills endorsed, deposits received, drafts paid, and the like transactions conducted as matter of course by the appropriate customary officers, without any authorizing vote of the directorial board. These matters do not constitute the "management" of the bank, nor interfere with the "control" of its affairs. They are properly the medium through which that management and control are introduced into the practical transactions.

DIRECTORS AS TRUSTEES.

The high degree of confidence and responsibility resting upon directors of corporations has often led courts to regard them as trustees, and to declare the relationship existing between them and the stockholders to be that of trustees and *cestuis que trustent*, respectively. If this can be asserted with regard to the generality of corporations, it is peculiarly and exceptionally true with regard to banking corporations, in whose solvency the whole neighboring community must be at least indirectly interested. A bank of issue may properly be regarded as a quasi-public corporation. The directors of a bank are not trustees for the shareholders alone, but they owe an even earlier duty to the depositors, and, if the bank exercises the privilege of circulation, still a prior duty to the public at large. The law is, as it ought to be, very zealous in exacting the strict and thorough performance of these duties, and it is in the scrutiny of possible breaches of them that the rigid rules which govern trustees have been applied (1). It is not enough, to exculpate a director, that no actual dishonesty can be shown, that he cannot be positively proved to have been influenced by interested motives. Like a trustee he is absolutely prohibited from the performance of those questionable acts, wherein his conduct may be wholly free from blame, but where the bias of self interest is strong and may influence him even without his own recognition of the fact. A director, who wishes to keep completely within the protection of the law, must look to something more than the mere integrity of his own intentions. The law is obliged to forbid a certain general class of actions in which the temptation is so great that it is wisely regarded as better wholly to remove human frailty from the possibility of yielding than to be continually plunging into darkling inquiries as to the probable purity and uprightness of sundry isolated transactions. It is possible that any person, being a director, might, at a meeting of the board, vote honestly and with a single eye

(1) See *Drake v. Bank of Toronto*, 9 Chy. U. C. 134 *Vankoughnet C.*

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to the Bank's welfare, upon a question in which he had an individual interest opposed to that of the corporation. It is also possible that he might intend so to vote, and yet not succeed in doing so by reason of the unconscious obliquity of mental vision which such circumstances may often produce. But a sound precaution prefers to exchange these possibilities for a certainty. The law, therefore, has, with wholesome care, declared that it is a duty of a director, resulting from the employment itself, not to acquire any interest in any matter adverse to that of the Bank so long as he remains in office. Likewise as a trustee is not allowed to make any profit from, or by the aid or use of, the object matters of his trust, so a director is forbidden to make any profit out of his employment. Not only must he refrain from voting on questions in which he is directly interested, but he must not use his influence, resulting from his official position, to secure his own ends or his private advantage. Neither, of course, can he directly or indirectly barter this influence to any outside person upon any species of consideration moving from that person to himself. It is not enough in the eye of the law to protect him that he did not mean to prejudice the Bank, if his act is open to suspicion he will, like a trustee, be held to have violated his duty, which is not to strive to do questionable things conscientiously, but wholly to refrain from all actions or intermeddling in them of what nature soever (1).

Attempts have often been made to prevent, by statutory enactment, some of the more definite and openly dangerous acts which directors may sometimes be tempted to do for their own use and advantage. But this method is necessarily insufficient. The language, if specific, will cover too little; if general, will cover too much; and so in either case the phraseology will be easily perverted and the intent evaded on the plea of reasonable construction or necessity. The present act, like the National Banking Act of the United States, wisely refrains from any enactment on the

(1) The English and American cases in support of these common law rules are cited in Morse, p. 115, from whose work the principles here laid down are taken.

subject of loans or discounts made to directors. It leaves their conduct in all particulars to the supervision of the common law, which, as it has been above laid down, must be regarded as requiring only proper and efficient enforcement to render it fully equal to the task thus imposed upon it, of securing perfect purity in the administration of the Bank's affairs.

In the absence of legislative prohibition there is no rule of the common law which prevents the making a loan or discount to a director any more than to any other person. Only a director, applying for such a loan, must not vote or officially aid in the discussion concerning its allowance. The same principles of law will be applied to this as to other loans; but they will be rigidly enforced, and the proceedings will be severely scrutinized (1). He must behave himself strictly like any other *outside* customer of the corporation. He must cause his request to be acted upon by the majority of his co-directors, strictly exclusive of himself. It is probable that any circumstances of impropriety or suspicion attendant upon the fact of his making the application at all, or upon the manner of the making it or the procuring its acceptance, will be construed with a degree of stringency as against him, greater than would be exercised towards an ordinary outside borrower. Under any circumstances favoritism or fear of offending are too likely to have some influence in such a transaction, and even the suspicion of them cannot be too carefully guarded against. Prudence no less than right feeling should prevent the applicant from even being present at the discussion and vote.

Although, as we have said, the present Act wisely refrains from any enactment on the subject of loans and discounts made to directors, such subject has not been entirely ignored. A provision inserted in section 66, schedule B, will be found to have reference thereto. This requires a statement of the "aggregate amount of loans to and liabilities, direct or indi-

(1) See Conynham's Appeal, 57 Penn. St. 474.

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rect, of Directors, and forms or partnerships in which they or any of them have any interest" to be appended to each monthly return. In this manner publicity is given to any extraordinary abuse of the powers vested in the board, and the shareholders are thus afforded ample opportunity to exercise their rights with regard to the framing of a by-law to restrain the otherwise unlimited power of the directors.

A method frequently resorted to for securing the fidelity of directors in the exercise of their duties is to require them to own in their own right and unincumbered a certain amount of the corporate stock. Imperfect as this must be, as a check upon men of large property, it is perhaps the best available plan, and it has been adopted in the present Act. A provision to this effect is to be found in section 9, which declares that each director shall own at least "three thousand dollars of the stock of the bank, when the paid up capital thereof is one million dollars or less; four thousand dollars of stock when the paid up capital thereof is over one million and does not exceed three millions, and five thousand dollars of stock when the paid up capital thereof exceeds three millions."

CONTROL OF DIRECTORS OVER THE BANK'S PROPERTY.

Directors can use the funds and property of the Bank only for proper banking purposes, and for the strict furtherance of the business objects and financial prosperity of the corporation. Their discretion and power to manage its affairs extend only to the conducting those affairs in the best manner that their knowledge, foresight and observation can suggest, to the end of increasing the profits and enhancing the value of the investments which have been entrusted to their charge by others. They cannot use any portion of the money for such objects of usefulness or charity, or the like, as they may consider worthy of encouragement and aid. All their transactions must be strict matters of business. They cannot make gifts from the corporate property. They cannot, without authority from the stockholders, subscribe money



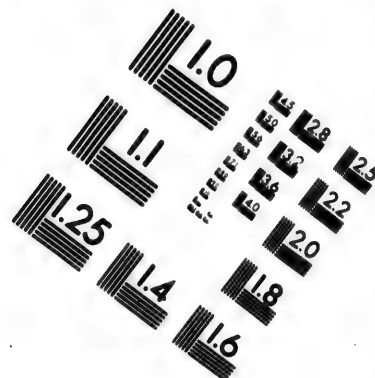
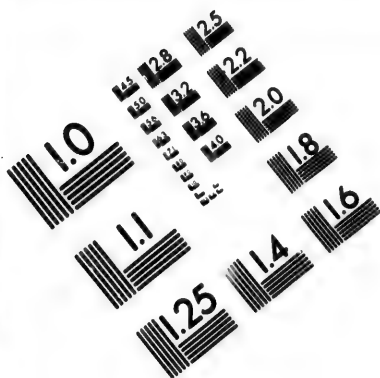
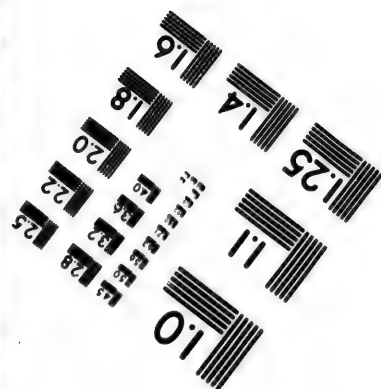
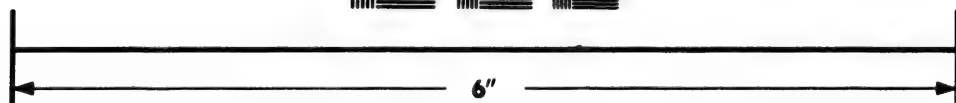
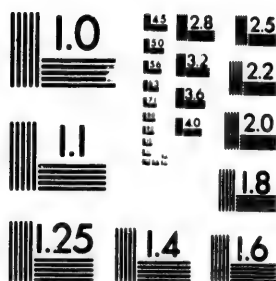


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to any objects, however meritorious, unless with the immediate view and expectation of thereby furthering the actual worldly and material well-being of the Bank. They are trustees of the property of others for this sole and only purpose, and if they appropriate any portion of the property for any other purpose whatsoever, however intrinsically deserving, it is yet a deviation from their obvious duty, both legal and moral, for it is nothing else than a clear breach of a plain and simple trust.

Such an act, if upon its face perfectly regular, and within the scope of the directorial authority, and if the circumstances did not affect third parties with notice of its wrongfulness, would, as toward such parties, bind the Bank. But if the real nature of the act were known to the outsider he would be held to a knowledge of its illegality arising from its not being within the ordinary agency conferred by the corporate principal upon its official agents. For directors, though they are the government of the corporation, are yet, no less than any subordinate officers, its agents with a definite scope to their agency, and can only act legally within this scope (1). If their act is such that it is the duty of the party dealing with them to know that it falls without the ordinary limits of directorial power, he will be affected by its invalidity. If the facts are known to him which show that as a matter of law the directors are undertaking an act of this description, he deals with them at his own peril if he neglects to satisfy himself that they have received a special and extraordinary authority in the particular case. If they have not, any loss he may incur is only the natural result of his own laches. Thus it is a principle of law that the directors can only use funds of the Bank for legitimate banking purposes. If they borrow money intending to use it for other purposes, and the lender is aware of this intent, then their use of it accordingly will relieve the Bank from indebtedness upon the loan (2).

(1) *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Ridley v. Plymouth Grinding and Baking Co.*, 2 Exch. 711.

(2) *Bank of Australasia v. Breillat*, 6 Moore, Privy Council, 197.

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As a rule they cannot voluntarily release a debt owing to the corporation (1); but where the emergencies of business require it they may make a normal or merely apparent sacrifice of bank property, if it seems reasonably likely to redound to the substantial benefit of the institution. In the *bona fide* pursuit of this end, their power is not limited by technical restrictions which, under other circumstances, would forbid their cancelling debts owing to the Bank.

Cases shew that they may commute a debt if it seems to them practically more advantageous to do so than it would probably be to push it at law, or to retain the naked legal claim for the full amount. In like manner if any officer of the Bank is in arrear or default, it is perfectly in their power to compound and settle with him in any manner and upon any terms which seem to them likely to secure the most complete reimbursement to the Bank. Their contract of this nature can be subsequently avoided by the Bank, solely on the ground of further fraud or dishonesty of the compounding officer occurring in the negotiation itself (2).

In like manner it not unfrequently occurs that the wrongful or erroneous act of an officer causes a loss to the Bank which he can be held liable to reimburse, but which there is reason to believe can only be recovered by a suit against some other third party. But if recourse is had to the suit against the third party, then the testimony of the officer in fault may be absolutely essential, or at least very desirable, to secure the success of the Bank. Whereas on the ground that he is a party immediately interested in the result of the litigation, he must in all probable expectation be rejected at the trial as an incompetent witness, unless he is first legally and fully released from his liability to the corporation. In this dilemma it is the duty of the directors to consult solely comparative ultimate probability of securing reimbursement to the Bank from the defendant or from the officer. It may be that the amount of the loss is greater than can possibly

(1) Stanhope's case, 3 De G. & Sm. 198.

(2) Frankford Bank v. Johnson, 24 Me. 490.

be recovered from the officer or from his bondsmen, while the defendant would be amply able to pay it. It may be that the result of the suit is doubtful; or it may be that only a successful result can in reason be anticipated. Upon the consideration of such facts, the directors must conclude whether or not worldly wisdom would lead them to release the claim of the Bank against the officer, or to abandon the notion of the other suit, or to sacrifice in its prosecution the advantage of his evidence. If their choice is of the first alternative, then it is not only in their power but it becomes their duty to execute to him a full, valid, and sufficient release from his liability. We say they must be guided solely by their notion of worldly wisdom in the case; unless by direct sanction from the shareholders, their feeling towards the officer, and their opinion of his conduct and character, cannot be allowed any weight whatsoever; and this equally whether this feeling and opinion would lead them to punish him to the utmost extent of their power, or to pity and relieve him. The question is purely of dollars and cents, not of moral desert, vindictiveness, or of commiseration (1).

OVER-ISSUE OF NOTES.

Where the Bank has the legal authority to issue its bills or notes for circulation as currency, the power to make the issue is one of the ordinary and inherent functions of the board which the public has a right to presume is vested in, and will be honestly exercised by, the directors. The Bank is held to warrant their fidelity. If the issue is attended with any error, neglect, or fraud, the resulting loss is that of the Bank. For example, if there be, from any of these causes, an over-issue, the Bank must yet redeem all the notes in the hands of innocent holders(2), and pay any penalty which may be imposed by the legislature in cases of over-

(1) *Lewis v. Eastern Bank*, 32 Me. 90.

(2) *McDougall v. Bellamy*, 18 Ga. 411.

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issue (1). The transaction, falling within the ordinary scope of directorial authority, is one wherein the Bank guarantees both the integrity and the accuracy of its agents.

DUTY OF DIRECTORS CONCERNING UNAUTHORIZED ILLEGAL ACTS OF OFFICERS.

It will sometimes happen that a subordinate officer will do an act either illegal or fraudulent, which is of such a nature or done in such a manner that it does not necessarily bind or affect the Bank. Thus the conduct of a single official may be such that if it could be construed as the action of the corporation, it would cause a forfeiture of the charter; but if it be without the direction or privity, *a fortiori* if it be contrary to the actual orders, of the board of directors, the punishment will be meted solely to the wrong-doer, and it will be considered that the nature of the case furnishes no ground for a proceeding for forfeiture or penalty against the Bank itself. But whenever knowledge of the commission of an act of this description, any or all the possible results of which might be averted from the Bank, is brought home to the directors, it is incumbent upon them at once to disavow the doings of their officer on behalf of the body corporate, to decline to allow the corporation to receive any benefit from them, and, so far as can be done reasonably and without injury, to seek to undo the transaction if it be still inchoate or imperfect. If the whole affair is completed and can no longer be repudiated or undone, or if no good or just end could be attained by the repudiating or undoing when knowledge of it first reaches the board, still it is their duty promptly to remove the official who was guilty of the misdemeanor. If they neglect these steps, if they knowingly suffer the Bank to reap advantage from the wrongful conduct, or if they continue to retain the wrong-doer in the service of the Bank, they will be regarded as sanctioning and adopting his acts on behalf of the Bank, and it will be affected by

(1) Section 40, sub-section 2.

these precisely as if they had been originally done under direction, or with the cognizance, approval, or collusion of the corporate government (1).

Before permitting any cashier, officer, clerk or servant of the Bank to enter upon the duties of his office, the board of directors must require him to give bond or other security for the due and faithful performance of his duties (2). Such obligation may be in any sum which the directors see fit. The power to take official bonds is inherent in every corporation, independently of statutory permission; and the permission, or the command, to take them from any particular officers cannot be construed to preclude the power of taking them from others also (3). The Act gives no right to the corporation to require bonds of a director, at least, unless he shall also fill some other office. But this does not render the taking of a bond from a director illegal, nor does it prevent such a bond from being valid at common law. It only deprives the bond of a statutory character, which is an insignificant loss, inasmuch as it seems to be attended by no very definite practical advantage.

The statute gives no description concerning the terms of the bond, and thereby it saves the chance of considerable litigation in cases where the bond might not precisely conform to the legal requirements. Generally it may be said that any condition in the bond, consistent with its general character, and not in contravention of the rules of law, of good morals, or of public policy will be sustained. Although the obligation may be in any sum which the board may see fit, it is not probable that they would be allowed to recover any designated sum as "liquidated damages" in all cases, neither any money in the nature of vindictive or penal damages, at least from the sureties. From them the recovery should be limited to the actual amount of the loss. The bond is strictly

(1) *Bank Commissioners v. Bank of Buffalo*, 6 Paige, 497; *Robinson v. Bealle*, 20 Ga. 275.

(2) Section 18, sub-section 2.

(3) *Bank of Northern Liberties v. Cresson*, 12 Serg. & R., 306

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for reimbursement, not for either punishment or profit. This character imperatively fixes the measure of damages at the amount of actual pecuniary loss or injury which the Bank has sustained (1). And it is conceived that only the injury, naturally and in the ordinary course of business arising from the misconduct, can be recompensed. Remote results cannot be proved against the sureties; much less results, which are in a measure due to negligence or ignorance of the directors in the events transpiring after the malfeasance.

THE BANK IS BOUND BY THE ACTION OF THE MAJORITY,
THOUGH INFORMAL, PROVIDED IT BE TAKEN AT A REGU-
LAR MEETING OF THE BOARD.

The Bank is bound by the action of the majority of the board, taken in the manner usually adopted by the board, no matter how informal or peculiar that manner may be. An expression of the will of the majority is what the law looks for and recognizes(2). It seems, however, that it is indispensable to the validity of any action that it should be taken by the board; that is, that it should be the vote of a majority of a quorum, at a regular and legal meeting of the board. Thus it has been held, that the assent of a majority of the directors, expressed by them individually, and not at a regular stated meeting of the board, is not sufficient to confer upon the cashier authority to do any act which he would not have authority to do unless it was conferred upon him by the directors(3). But it also appears that when a quorum of the directors are assembled at a legal meeting, they will bind the Bank by their proceedings, even though the remainder of their number have had no notification of the meeting (4). Though the action of the quorum may be valid as the action of the corporation under such circumstances, yet it by no

(1) *Bank of Washington v. Barrington*, 2 Penn., 27.

(2) *Bank of Middlebury v. Rutland & Washington R.R. Co.*, 30 Vt. 159.

(3) *Elliot v. Abbot*, 22 N. H. 549.

(4) *Edgerly v. Emerson*, 3 Fost. 555.

means follows that they may not themselves be in fault if the failure to notify all the members of the board was not absolutely unavoidable.

DIRECTORS ENTITLED TO NOTICE OF MEETING. CANNOT BE DEPRIVED OF RIGHTS PERTAINING TO THEIR OFFICE.

It is the duty of every director to be present at every meeting of the board. Clearly the responsibility which rests upon him as a part of the government of the corporation, gives him the absolute right to demand that due notice be given him of all meetings of the government for deliberation or action. The directors have no power or discretion, directly or indirectly, to debar any one of their number from the exercise of all his rights, *a fortiori*, from the performance of all his duties. Not even the conviction, honestly entertained by all the rest, that one of the members is secretly hostile to the real interests of the Bank, will authorize them to refuse him any of those means of scrutinizing its affairs which ordinarily pertain to his incumbency in office. Even the formality of a by-law is impotent to deny him access to the books and accounts. A by-law assuming to do so is simply invalid, being "repugnant to the provisions of this Act," and especially to section 25. The effort to exclude by such a by-law constitutes, by itself, sufficient and proper ground for the granting of a writ of *mandamus* in favor of the excluded official; and the writ may be directed, not alone to the other directors, but also to any subordinate officer who has assisted in the attempt to prevent the ousted petitioner from exercising any of his legal functions. The supposed hostility on the part of the petitioner towards the corporation, even if it should be proved, would furnish no valid cause for withholding the writ (1).

RECORDS.

Records of the proceedings of the board of directors are

(1) *People v. Throop*, 12 Wend. 183.

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good at law, although not taken at the time of the meeting. They may be made at any time subsequently and relate back (1).

VACANCIES.

In case of a vacancy occurring in the number of the board, such vacancy must be filled in the manner provided by the by-laws, but the non-filling of the vacancy will not vitiate the acts of a quorum of the remaining directors (2). Nor will the filling of such vacancy in an illegal manner have that effect (3). The attempted act being a mere nullity, the vacancy still exists. When by-laws had never in fact been made by the shareholders as required, and a vacancy occurring in the board, three of the directors had appointed one A to fill such vacancy, it was held that A had not been legally made a director. But when a call had been made by four of the directors, of whom the one who seconded the resolution was the director thus illegally appointed, it was held that such call was valid, three of the directors who made it being legally qualified (4).

CONTINUANCE IN OFFICE.

It is a common proviso that directors, once chosen, shall remain in office until a choice of successors has been made (5). This is a useful and convenient precaution by which accidental or unavoidable intervals are bridged over, without an interregnum, than which nothing could be more injurious to the interest of the Bank. Though the original term of office be limited to one year, yet it may be indefinitely prolonged under this provision. The rule and its workings are usually simple enough, and we have found only one case where litigation has arisen under it.

(1) *Commercial Bank v. Bonner*, 13 Sm. & M. 649

(2) Section 12, sub-section 5.

(3) *Bank of Liverpool v. Bigelow*, Russ & Creas, N.S.R. Supreme Court, 236 (1878).

(4) *Ibid.*

(5) Section 15.

SECT. 2.—THE PRESIDENT, OF HIS POWERS AND DUTIES
GENERALLY.

Ordinarily the position of President is one of dignity and of an indefinite general responsibility rather than of any accurately known power. He is usually expected to exercise a more constant, immediate, and personal supervision over the daily affairs of the Bank than is required from any other director. Usage or directorial votes may confer upon him special functions, and may extend his authority to correspond with the increase of actual duties. But the authority inherent in the office itself is very small; indeed, it is very difficult to say precisely how or wherein it is really much in excess of that which can be exercised by any other single director. Practically this legal principle is not known or not distinctly recognized in very many Banks, and frequently Presidents undertake to exercise a very considerable control in the daily routine of business. When this is done with the knowledge and approbation, or the tacit sanction of the board of directors, it may be regarded as legalized by the principles of ratification or usage. Yet these afford an indefinite and dangerous basis on which to rest important dealings. A careful collation of all the adjudicated cases, it must be confessed, wears a striking and peculiar aspect, which is not very favorable to the assumption of any species of executive power by a bank President without direct authorization. With scarcely an exception all the decisions are to the effect that the President had no right to perform some particular act, which he had undertaken, probably in perfectly good faith, to perform, and which had been called in question, and had given rise to the litigation in which it was condemned. So the reader will notice that in discussing this topic we are obliged to confine ourselves almost wholly to declaring what a President can *not* do.

Indeed it is a singular fact that the entire collection of judicial authorities justifies the enunciation of only one act as falling within the properly inherent power of the Presi-

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dent. This solitary function is to take charge of the litigation of the Bank. There is no question but that this matter belongs to him by virtue of his office. He may institute and carry on legal proceedings to collect demands or claims of the Bank. He may appear, answer, and defend in suits against the Bank. He may retain and employ counsel on behalf of the Bank. Counsel requested by him to act for the Bank will bind it by their action in the case, within the ordinary powers of counsel, by sole authority of their engagement by him. Nor will it make any difference though circumstances render that engagement originally wrong or improper (1.) This would be his own breach of trust towards the Bank, committed within the scope of his authority, damages for which the Bank could only recover from himself, and which could affect no innocent outside parties, whether these should be the counsel employed or the other litigants in the cause.

Where one transacts business or enters into contracts or agreements with the President of the Bank, which in form run between the person upon the one part and the President, described as such, upon the other, if it was understood by the party at the time that he was in fact dealing or agreeing with the Bank; if he acted upon this supposition in good faith; if the President had from any source authority to bind the Bank in such a transaction; and especially if the Bank actually receives whatever benefit may accrue from it, then there can be no doubt that the Bank could be held to perform whatever was undertaken on its behalf by its President. But if the President was acting beyond the scope of any authority derived from his office, or from directorial votes or from usage, then his act, except of course by virtue of a subsequent ratification, could not bind the Bank. Even where the President does not designate himself as such, yet the circumstances of the transaction may be put in evidence, to

(1) *Savings Bank of Cincinnati v. Benton*, 2 Metc. (Ky.) 240; *American Ins. Co. v. Oakley*, 9 Paige, 496; *Mumford v. Hawkins*, 5 Den. 355; *Oakley v. Workingmen's Benevolent Society*, 2 Hilt. 487; *Alexandria Canal Co. v. Swann*, 5 How. 83.

show, so far as they may be able, that he was in fact acting in his official capacity, and, if this be established, the failure to designate himself formally by his official title will not affect the binding force of the transaction upon the Bank. But if the dealing was with him as an individual not as an officer, the Bank has nothing to do with the affair.

Thus where one gave money to a bank President, who signed a receipt for it "to be deposited in the Bank to the credit of A.," and signed the receipt simply with his name alone, it was held that the facts were admissible to go to the jury for what they might be worth as tending to show that the money was paid to and received by the President in his official capacity on behalf of the Bank; but that they were by no means conclusive of this, and that if the jury should find that the money was intrusted to the President as a private individual, simply for the convenience of getting him to deposit it on behalf of A., then he was A.'s agent, and if he failed to make the deposit regularly and honestly, it was his individual, not his official, default, and the Bank was not liable. (1). Precisely to the same effect was the decision in *Terrell v. Branch Bank* (2). Though the officer receiving the money was in this case a director, the principle of law is identical in the two rulings.

PRESIDENT'S CONTROL OVER PROPERTY OF THE BANK.

The control of the President of a Bank over its property of any description whatsoever, from real estate down to a naked right to bring an action at law, is of the slightest. He has no power to draw checks in its behalf, or against its funds. He is not the executive officer who has charge of its moneyed operations. It is not among his functions to withdraw or remove its deposited funds, or to use them for any purpose whatsoever. He cannot even employ any portion of the assets or credits of the Bank for paying or settling with its

(1) *Sterling v. Marietta & Susquehanna Trading Co.*, 11 Serg. & R. 179.

(2) 12 Ala. 502.

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creditors, unless by virtue of an express delegation of authority from the directors. He has no more power of management or control over the property of the corporation than any other single member of the board. (1)

These remarks, of course, refer to his inherent powers enjoyed *virtute officii*; for, of course, if any resolution or any established usage gives him the power, either at all times or under special circumstances, to draw against the corporate deposits, he may do so within the limits of the power.

The President does not possess the power to surrender or release claims of the Bank against any person, from whatsoever source arising; or to stay the collection of an execution against the estate of a judgment debtor. For either of these acts is the exercise of a discretionary authority over the affairs and property of the Bank, which is the peculiar and exclusive province of all the directors (3).

Unless specially empowered, the President cannot enter into contracts or agreements on behalf of the corporation. Authority so to do may however be conferred on him by vote of the board of directors, or by the existence of such facts as constitute a public holding out, and warrant the public in believing that the undertaking is within the scope of his legitimate delegated authority (4). But a directorial vote, conferring a power upon the "president *and* cashier," will be strictly construed as conferring only a joint power, exclusively, and by no means a joint and several power.

The execution can be by neither of the designated parties singly, but must always be strictly by both in conjunction (5). Though if both agree that a certain course shall be pursued, and that an executive act occurring therein shall be done by

(1) *Gibson v. Goldthwaite*, 7 Ala. 281.

(2) *Neiffer v. Bank of Knoxville*, 1 Head. 162; *Fulton Bank v. New York & Sharon Canal Co.*, 4 Paige, 127.

(3) *Olney v. Chadsey*, 7 R. I. 224; *Brouwer v. Appleby*, 1 Sandf. 158; *Spyker v. Spence*, 8 Ala. 333.

(4) *Mt. Sterling Turnpike Co. v. Looney*, 1 Met. (Ky.) 550; *Farmers' Bank v. McKee*, 2 Penn. St. 318.

(5) *Ridgway v. Farmer's Bank*, 12 Serg. & R. 256.

one alone, that act may be legally performed according to such arrangement. This is mere matter of detail, and pertains to the execution not to the exercise of the power. For example, where the power is to borrow money, if they agree upon all the items going to make up the transaction, but that the note given for the loan shall be indorsed by the cashier alone, this will be a perfectly regular and sufficient execution of the duty intrusted to them (1).

SECT. 3.—LIABILITY OF DIRECTORS FOR MISMANAGEMENT.

If Bank directors do not manage the affairs and business of the Bank according to the directions of the charter and in good faith, they will be liable to make good all losses which their misconduct may inflict upon either shareholders or creditors, or both. But for excusable mistakes concerning the law, and for many errors strictly of discretion, they are not liable. Though in cases in which their action has been so grossly ill-advised as to warrant the imputation of fraud, or to show a want of the knowledge absolutely necessary for the performance of their duties, so great that they were not justified in assuming the office, they may be held responsible. (2) They are required simply to show a reasonable capacity for the position they accept; to use in it their best discretion and industry; to show the scrupulous *bona fide* and conscientiousness in every matter, however minute, which is exacted rigorously from all trustees of the property of others; and to obey accurately the requisitions of the charter, or of the general banking law under whose provisions they come.

IMPROPER DECLARATIONS OF A DIVIDEND OR BONUS.

For example, if directors declare a dividend at a time when the Bank is so far embarrassed that such a needless disburse-

(1) *Fleckner v. Bank of United States*, 8 Wheat. 334.

(2) *Godbold v. Branch Bank*, 11 Ala. 191; *Smith v. Prattville Manf. Co.*, 29 Id. n. s. 503.

ment of money must be regarded as an act of either fraud or folly, and which could have been advocated by no man who was not either dishonest or grossly incapable, they may be held liable for the consequent loss to the corporation. (1) The act is not to be excused, for it must be either fraudulent or the result of such excessive unfitness as to become the legal equivalent of fraud.

It will be a breach of charter provisions to declare a dividend or bonus out of the capital stock of the Bank instead of out of earnings, and such an act of malfeasance will render the directors concurring therein jointly and severally liable for the amount equal to the impairment, as a debt due by them to the Bank (2). And so in like manner will they be held liable, if having a rest or reserved fund of less than twenty per cent. of the paid-up capital of the Bank, they authorize a division of profits, either by way of dividend or bonus, or both combined, or in any other way exceeding the rate of eight per cent. per annum (3).

OFFICIAL BONDS.

Again, the directors may render themselves liable to the corporation for neglect of their duty, in failing to comply with the requirements of section 18, with reference to official bonds. If any mischief results to the corporation by reason of their failure to take the bonds required by law, they may be held responsible for it, as they may for any other malfeasance in office.

When the charter forbids the issue of bills for circulation, before a certain portion of the capital stock has been subscribed and paid in, an issue before that time will make the directors personally liable to redeem any of the bills which the Bank is unable to pay in the due and ordinary course of its business. A statutory requisition of a nature so plain and simple as this cannot be excusably broken. If broken, the

(1) Gunkle's Appeal, 48 Penn. St. 13.

(2) Section 27.

(3) Section 28.

breach cannot be regarded as a mistake of law (1). Mistakes as to what is the law serve to excuse cases where correct knowledge could be reasonably expected only from a professional man, and even in such cases if the directors feel any doubts they may be guilty of neglect if they fail to seek and be guided by competent legal advice (2). But ignorance of any fact in the Bank's affairs, which it is their duty to know, can never be set up by them in defence or exculpation for any act which the existence of that fact should have prohibited (3).

THE LIABILITY AN ASSET OF THE BANK.

If liability of a director once accrues for any species of malfeasance in office, whether his acts have been the result of dishonesty, negligence, or incompetence, the claim of the bank against him becomes a part of the assets of the institution. An assignee or other party whomsoever, who may come into possession of the corporate property for the purpose of collecting it and distributing it among the creditors and shareholders, is obliged to regard the right of action against such delinquent directors as a part of the available assets. It is his duty to push the claims; to make what he can out of them, and to apply the proceeds together with the other funds of the corporation to the discharge of its indebtedness, and the reimbursement of its creditors and shareholders. The liability is at common law, and though a statute or charter may declare what acts of a director, and under what circumstances committed, shall render him liable, yet these enactments will not operate to alter the nature of the liability, once accrued, or to render it statutory. They must be construed as simply relating to evidence, and as declaring that testimony establishing the act and circumstances described, shall suffice to fix the liability; which, however, after

(1) *Schley v. Dixon*, 24 Geo. 273.

(2) *Godbold v. Branch Bank*, 11 Ala. 191.

(3) *Bank Commissioners v. Bank of Buffalo*, 6 Paige 497.

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it has been thus fixed, will still retain its original and inherent common-law character. But whatever liability may have been incurred by all or any of the members of a board of direction, it will not descend to their successors in office, who are blameless upon their own account. Neither will it pass to any third party to whom they have assigned corporate property, if he took it in good faith, without collusion, and for value (1).

FALSE AND DECEPTIVE STATEMENTS.

It sometimes happens that the directors of a banking corporation put forth deceptive and fraudulent reports, and make false statements concerning its affairs, in order to keep up its good repute with the public, and to sustain or raise the price of shares by attracting purchasers. A collection of case-law on this and cognate subjects is to be found in Shelford's Law of Joint Stock Companies, and other books, referring to the highest sources of authority in cases upon this subject in England; both on the question of a report of directors being in any sense a representation to an outsider who buys on the faith of it; and also on the point whether it is to be considered a report of directors, or (after its adoption by the Bank) a report by the latter as having approved of it and profited by it.

Reports made and accounts rendered by directors in the course of their duty, though made and issued to the shareholders only, as to the state and affairs of the company, are considered the representations *of the company*, not only to shareholders, but to the public, if they are published and circulated by the authority of the directors, or a general meeting. But such reports and accounts made and issued to the shareholders are not the representations of the company to a person who obtains knowledge of their contents only

(4) Schley v. Dixon, *supra*.

from private sources⁽¹⁾. The various judgments with respect to this part of the law are very conflicting, both on account of the view formerly taken by the courts as to the difference between companies and other persons as to their liability for the frauds of their agents, and from its having been considered that reports made to shareholders could not be considered reports made by them. The real question, however, seems to be whether the person deceived has obtained knowledge through persons he has a right to consider authorized by the company to afford such information ⁽²⁾.

In the case of the National Exchange Bank of Glasgow *v.* Drew ⁽³⁾ Lord Cranworth said: "What is the consequence of the company receiving a report and publishing it to the world? I confess that in my opinion, from the nature of things, and from the exigencies of society, that it must be taken, as between the company and third persons, to be a representation of the company. The company, as an abstract thing, can represent or do nothing, it can only act by its managers; where, therefore, the directors, in the discharge of their duty, fraudulently, for the purpose of misleading others, as to the state of the concerns of the company, represent the

(1) The Bank in its corporate capacity can never be held to answer for any species of fraud or deception of this nature, practised by any of its directors or other officers, individually, though at the banking-house and in banking hours. No single director, neither any other official, has it within the scope of his customary authority to bind the bank by any representations whatsoever made concerning its condition or affairs. The bank does not hold them out as competent to give information of this character, and any person who relies on statements thus received puts his confidence in the individual from whom the statements proceed; and though he may have a good cause of action against him, it is against him as a private individual and not as an officer of the bank, and can by no means be against the bank itself. The corporation can only be held liable if it publishes corporate reports, as such, falsely and with the criminal intent. Such would be a statement adopted at a general meeting of the directors and intentionally put forth to the public, or left to reach the community in the ordinary course of business. *Morse on Banks and Banking*, p. 137.

(2) *Shelford on Joint Stock Companies*, vol. III, par. 15, p. 56.

(3) *Macq.* 103.

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company to be in a different state from that in which they know it to be, and the persons to whom the representation is addressed act upon it, in the belief that it is true, I cannot think that society can go on without treating that as a representation by the company, otherwise companies of this sort would be in this extraordinary predicament, that they may employ, nay must employ, agents to carry on their concerns, and that those agents might make representations, be they ever so false and ever so fraudulent, and yet that the company might benefit by those representations." And in the same case Lord St. Leonards said: "I have certainly come to the conclusion, that if representations are made by a company fraudulently, for the purpose of enhancing the value of their stock, and they induce a third person to purchase stock, these representations so made to them for that purpose do bind the company. I consider representations by the directors of a company as representations of the company; although it may be a representation to the company, it is their own representation." These remarks are sanctioned by Lord Chemsford in a more recent case. (1)

And finally it has been said by Lord Westbury: "If reports were made to the shareholders of a company by their directors, and adopted by the shareholders at a regular meeting, and those reports were afterwards industriously circulated, undoubtedly representations contained in those reports must be taken, after their adoption, to be representations and statements made with the authority of the company, and, therefore, binding on the company; and if those reports, having been industriously circulated, should be clearly shown to be the proximate and immediate cause of shares having been bought from the company by any individual, undoubtedly it would be impossible consistently with the principles of equity to permit the company to retain the benefit of that contract, and to keep the purchase money." (2)

In fine, it has been the opinion of the most eminent

(1) *Western Bank of Scotland v. Addie*, L. R. 1 Sc. Ap. 156.

(2) *New Brunswick R. Land Co. v. Conybrare*, 31 L. J. 302.

judges of the present day, that if in a body consisting of a great number of shareholders, the directors whose duty it is to present a balance sheet or report to the body at large containing a representation of the state of the affairs of the company; if that body executing that duty or that function make a report that is entirely false, and if that is made to a public and general meeting, although there be no order to publish it either by the directors or the body at large from the very nature of the case, it must be made public. (1)

A great number of cases, more or less distinguishable from each other in some of their details, are collected in the work already mentioned, as also in a recent work by Mr. Buckley, the third edition of which appeared in 1879—but without going into them it may be gathered from what we have already observed that if representations made in a report should turn out to be false and to have caused injury, there is abundant authority for holding that such a representation is a representation made to the outside public for which the directors, and, in certain cases the corporation itself, may be held liable.

With regard to the personal liability on the part of the directors, in certain cases, there can be no manner of doubt. The 81st section of the present Act says that every president, vice-president, director, principal partner *en commandite*, auditor, manager, cashier, or other officer of the Bank, who prepares, signs, approves or concurs in the making of any false or deceptive statement, or uses the same with intent to deceive or mislead any person shall be responsible for all damages sustained by such person, in consequence thereof, and shall be further liable to imprisonment for a term not exceeding two years. Here we have both, criminal and civil responsibility, the latter expressly extended to Bank directors. This is only a reiteration of the common law rules as declared in article 1053 of the Civil Code of the Province of Quebec, that "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another,

(1) Per Kindersley V.C. National Patent Steam Fuel Co. v. Worth, 4 Drew, 529.

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LIABILITY TO SHAREHOLDERS INDIVIDUALLY.

The right to sue directors for malfeasance in office, whereby loss accrues to the shareholders, is often expressly given to the shareholders by statutory enactment, though, without doubt, it exists at common law in the absence of legislative intervention. Errors of judgment, unless so gross as to resemble fraud, or to render the acceptance of office practically a fraud by reason of entire incapacity and unfitness for it, give no right of action. But any fraudulent act or any breach or neglect of charter provisions, whereby loss is entailed upon the corporation, and the value of the shareholder's property is as a necessary consequence depreciated, gives a right of action at law to each one of them to recover the damage or loss which he individually has sustained. The suit need not join all the directors, nor even all who participated in the wrongful act, as defendants; but any one of them may be sued singly.

In this case, however, the declaration is insufficient, if it alleges simply that this sole defendant did an act which could in fact be done only by several directors. The allegation must be that he, together with others, did the act complained of, neither is it sufficient simply to allege that he has done wrongful acts. The nature of the acts should be set forth in general terms, though an accurate description of each part or element going to make up the entire act complained of must often be impossible and may be dispensed with. An allegation that by reason of the act the plaintiff's shares depreciated in value is a sufficient allegation of loss. That the directors declared a dividend out of the capital stock of the bank, instead of out of earnings, is a good cause of action. Nor is it a defence that the shareholder who brings the suit has himself received the dividend upon his own shares, provided that he did not know at that time the improper basis upon which it had been declared.

CHAPTER III.

CHARTER RIGHTS AND PRIVILEGES.

SECT. 1—OF THE POWER TO RECEIVE DEPOSITS.

SECT. 2—OF CHECKS.

SECT. 1—OF THE POWER TO RECEIVE DEPOSITS.

It is of the essence of the business of banking that the Bank or banker should receive on deposit the money and funds of other persons. In receiving deposits and opening accounts the Bank is free to choose whom it will as customers from among those that offer. The receiving a deposit from a person, without explanation or understanding to the contrary, at once and without more makes that person a customer of the Bank. But no implied undertaking to allow him to continue so for any length of time exists, neither is he under any obligation to continue so. The relationship may be dissolved at any time by either party, saving the then existing liens and rights of each.

The Bank may receive deposits from any person whomsoever, whatever is his age, status or condition in life, and whether such person is qualified by law to enter into ordinary contracts or not; and, from time to time, may repay any or all of the principal thereof, and may pay the whole or any part of the interest thereon to such person, without the authority, aid, assistance or intervention of any person or official being required. (1)

The total amount which may be received on deposit from any one person or firm, legally capable of entering into ordinary contracts, may of course be the subject of convention between the contracting parties, but in the absence of con-

(1) Section 65.

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vention it is without limitation. If, however, the person making any deposit could not, under the law of the Province where the deposit is made, deposit and withdraw money in and from a Bank without being authorized by the above cited section of the Act, the total amount to be received from such person on deposit must not, at any time, exceed the sum of five hundred dollars. (1)

As to what persons are or are not qualified by law to enter into ordinary contracts, it may be stated generally, that all persons are capable of contracting, except those whose incapacity is expressly declared by law. (2) Consent being one of the four requisites (3) to the validity of a contract, such persons as are considered devoid of that freedom of will, combined with that degree of reason and judgment which can alone enable them to give the *assent* necessary to constitute a valid engagement, are declared by law incompetent to enter into a valid contract. Minors, married women, and persons insane or suffering a temporary derangement of intellect arising from disease, accident, or drunkenness or other causes, or who by reason of weakness of understanding are unable to give a valid consent, compose the classes of persons who in general are incompetent to acquire the rights and incur the obligations incidental to an intended deposit. (4)

RELATION OF THE CUSTOMER ON A SIMPLE DEPOSIT ACCOUNT.

The ordinary relation existing between a Bank and its customer, if not complicated by any further transaction than that of the depositing and withdrawing of moneys by the customer from time to time, is simply that of debtor and creditor at common law. The original and every subsequent deposit by the customer, is in strict legal effect, a loan (*mutuum*) by the customer to the Bank, and *e converso* every payment by the Bank to, or on account of, the customer, is a repayment of the loan *pro tanto*. Wherefore it follows that the customer

(1) Section 65.

(2) C. C. L. C., Art. 985.

(3) Ibid., Art. 984.

(4) Ibid., Art. 986.

can never hold or charge the Bank as a trustee, *quasi* trustee, factor or agent. The Bank may of course assume any of these functions (1) and in fact it often does so; but they are all nevertheless wholly outside of the ordinary legal relationship to the depositor.

The use of the word *deposit* to specify the contract is therefore a misnomer, and serves but to confuse the popular mind. The operations incidental to banking have outgrown the nomenclature at one time all sufficient.

If the Bank could be held in the character of trustee, it would follow that the giving of a cheque upon a Bank would operate as an assignment of the drawer's funds *pro tanto*, and would enable the payee to demand the amount as of right from the Bank (provided there were sufficient funds of the drawer to meet it), and upon non-payment to sue the Bank. The right of the check-holder to sue the Bank has, however, in England and the United States, at last, after continued litigation, been conclusively denied by courts of unquestionable authority, and the denial has been based in great measure upon the fact that the Bank is not in any sense a trustee. In Canada, however, according to the law of Quebec, a depositor in a Bank transfers his rights to the holder of his cheque on the funds to his credit in the Bank, so as to confer on him the same rights which the depositor himself possesses. (2) This decision, however, did not proceed in any manner from the assumption that a Bank occupies the position of a trustee with regard to moneys deposited with it, but from the positive enactment that Bank cheques are not subject to the provisions of the law governing the sales of debts and rights of action in general, which give no possession available against third persons until signification of the transfer has been made to the debtor and a copy of it delivered. The action was brought by the plaintiff Marler against the Molson's Bank for the

(1) See Grant on Bankers and Banking, ed., pp. 5, 11; Crosskill v. Bower, 32 Beav. 86, 32 L. J., ch. 540; Shields v. Blackburne, 1 H. B. L. 158 (per Lord Loughborough).

(2) Marler v. The Molson's Bank, 2 L. N. 166 (1879).

amount of a cheque, about \$700, signed by one Parker, which the Bank refused to pay. The defendant pleaded among other things that there was no privity of contract between the holder and the Bank, which would sustain a suit by the former, until the latter had done some act, as acceptance, by which it would have created that privity. The court said: "Does a depositor in a Bank transfer his rights to the bearer of his cheque on the funds to his credit in the Bank, so as to confer on him the same rights which the depositor himself possesses?"

"The check is a transfer by the depositor to a person named or bearer. Presentation alone constitutes signification. Article 2350 of the Civil Code says that, "checks are payable on presentment, without days of grace." After signification by this presentment, the transferee, called the bearer, is considered to be the proprietor of the claim transferred. The *lien de droit* between the transferor and the debtor is perfected by the signification. The universal practise of Banks to pay checks on presentment, with the funds of the drawer, would constitute a law based on custom. This usage has been established in the interest and at the request of the Banks. There would be fewer deposits if depositors were under the necessity of presenting themselves in person to obtain the payment of moneys deposited. Few would accept checks if this appearance in person were necessary. There are manifold inconveniences in the system advocated in the plea of the Bank, in which the absence of *lien de droit* is opposed to the bearer, and the Bank has no interest to oppose such want of privity. The action by the bearer is the same as that which the depositor might have brought.

"A check differs both in law and usage from a bill of exchange. It is from this difference that the right of the bearer to proceed directly against the Bank necessarily flows. It has never been doubted that payment to bearer is a good payment to the drawer, the same as though payment had been made to himself. That shows that the bearer can give a discharge, because by the transfer

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he is really the creditor. Article 2351 of the Civil Code entirely confirms the principle stated. After providing that the holder of a check is not bound to present it for acceptance apart from payment, it is added, "nevertheless, if it be accepted, he has a direct action against the Bank or banker, without prejudice to his claim against the drawer." This is simply the application of the principles and rules which govern sales of debts and rights of action. Articles 1570 and 1571, Civil Code. This is shown by article 1573."

This point does not seem to have been raised in any of the other Provinces, so the question as to the rights of a holder against a Bank, without acceptance, elsewhere in Canada than in Quebec must remain an open one.

Where the customer paid to his banker a certain sum, with the express contemporaneous stipulation that it should be used to take up a bill which he had accepted payable at the house of his banker's London correspondent, and afterward, upon the customer's becoming insolvent, and before the banker had advised his London correspondent to pay the bill, the banker appropriated the sum to meet the indebtedness of the customer to him, it was held that the drawers of the bill could not maintain an action against the acceptor's banker, on the ground of a lack of privity. (1) Though it might be inferred that, had the banker advised his correspondent to pay the bill, the decision might have been otherwise.

In England it has been held that where money is paid in to the banker by his customer, for the express and declared purpose that the same should be paid over to a third party, nevertheless such third party can enforce no claim against the fund until the banker shall, by some act upon his own part, have come under an obligation to pay to him. (2)

All the sums paid into the Bank on general deposit, by the same or different depositors, form one blended fund. (3) So

(1) *Hill v. Royds*, 8. L. R. Eq. 290.

(2) *Mulcolm v. Scott*, 5 Exch. 610; *Grant on Bankers and Banking*, 3d ed. p. 4.

(3) *Devaynes v. Noble*, 1 M. & C. 541; *Bodanham v. Purchas*, 2 Barn. & Ald. 39; *Henniker v. Wigg*, 4 Q. B. (Ad. & El.) 792; *Commercial Bank of Albany v. Hughes*, 17 Wend., 94.

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soon as the money has been handed over to the Bank, and the credit given to the payer, it is at once the proper money of the Bank. It enters into the general fund and capital, and is undistinguishable therefrom. Thereafter the depositor has only a debt owing him from the Bank, a *chose* in action, not any specific money, or a right to any specific money. (1) It follows that the act of deposit having been once consummated, nothing short of payment on the part of the Bank, or some act of the depositor himself, will suffice to exonerate it from the indebtedness it has assumed. The identical bag of coin or roll of bills in which the deposit was made may be stolen, before it has been in any practical manner comingled with the funds of the Bank; it may be embezzled or fraudulently misapplied by an officer of the Bank; still the indebtedness of the Bank subsists entirely unaltered by these circumstances.

On the other hand, however, it appears that under certain peculiar circumstances, the customer may follow and establish his ownership of funds deposited by him, but not yet actually mingled with the assets of the Bank. Thus, when money is paid in by a customer after banking hours, and is put in a separate place by itself, and not entered in the regular books of the Bank, and the Bank fails and does not open on the next day, the necessity of failing having been already agreed upon by all the partners, the customer may reclaim his deposit and hold it as against the assignee of the bankrupt. (2) Though in another case, wherein it was shown that the bankers were in the habit of receiving, and the customer was in the habit of making, deposits after banking hours, and that such deposits were always regarded and treated by both parties as if regularly made during banking hours, and the bankers had not deter-

(1) *Marine Bank v. Fulton Bank*, 2 Wall. 252; *Thompson v. Riggs*, 5 id. 663; *Bank of the Republic v. Millard*, 10 id. 152; *Aetna National Bank v. Fourth National Bank*, 46 N. Y. 82; *Carr v. National Security Bank*, 107 Mass. 45; *First National Bank v. Ocean National Bank*, 60 N. Y. 278.

(2) *Threlfal v. Giles*, cited 2 M. & Rob. 492; *Sadler v. Belcher*, id. 489.

mined upon the necessity of failing when the deposit was made, a contrary decision was reached (1).

The various items of deposit with and payment by the Bank form a running account between the Bank and the customer. For any indebtedness accruing from the customer to itself, the Bank has the right of set-off. If the depositor becomes bankrupt, his deposit becomes security for the payment of his debt to the Bank. If this debt be contingent in character, or if it be a claim for unliquidated damages arising out of a contract, then the Bank may retain possession of the deposit until such time as the probable indebtedness shall be ascertained, when the deposit may be set off against it. (2) The rule was laid down by Judge Lowell, in the case cited, that "The credit should be set off against the whole ultimate debt of the Bank, that is to say against the aggregate amount of the notes of the bankrupt in which he is the principal debtor; and as to those on which he is indorser, so far and so far only, as is made necessary by the insolvency of the real principals."

But though the items constitute a running account, yet it is not of such a nature that a bill in equity for an accounting will lie. At any time the simple striking of a balance between the two columns of debits and credits will show a sum which is a simple debt; so that there is in fact no ground on which an accounting can be demanded in equity. An ordinary action of debt will lie on behalf of the depositor, and if the Bank answer payment or discharge, it is matter of common law, where the remedy for either party is perfect. Neither, as has been stated, is there a fiduciary relation of any nature whatsoever between the parties which could justify recourse to equity. Suit will lie on the common money counts. This has been conclusively settled by the sound decision given by the House of Lords in the case of *Foley v. Hill*. (3)

(1) *Ex parte Clutton*, 1 Fonb. 167.

(2) *In re North*, 16 N. B. R. (Mass. Dist.) 420.

(3) 2 H. L. Cas. 39.

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OBLIGATION OF THE BANK TO HONOR CHECKS.

The Bank is under the obligation of honoring the customer's drafts and checks whenever the same are presented for payment, provided that at the time of such presentment the balance of the account, if then struck, would show a credit in favor of the customer of funds, on which the Bank has no lien, sufficient to meet the sum called for by the check or draft. The contract so to honor the depositor's orders is implied from the usual course of business. The deposit is made with the tacit understanding that the Bank shall respond to the depositor's orders, so long as there is a sufficient balance to his credit. (1) Such an order is almost always expressed in writing, by check or otherwise. But there is no absolute necessity for this. A verbal direction from the customer to the Bank, to pay a sum or to transfer a credit, would fully justify the Bank in so doing. If the Bank itself is willing to act upon a verbal order, this would be a perfect defence to a suit by the depositor for the amount transferred under it. But though the Bank may, if it choose, act upon such directions, it is under no obligation to do so; by the usages of the banking business it is entitled to demand some written evidence of the order. (2) So, too, the customer may draw out his funds in such parcels as he may see fit, both as regards number and amount. The rule of law forbidding a creditor to split up his demand does not affect this principle, which is based upon a custom of the banking business that has been well said to be so ancient, unquestioned, and well known that courts will take judicial notice of it, without proof. (3)

The banker cannot excuse his disobedience of his customer's orders, in the due course of business, by setting up that

(1) *Downes v. Phoenix Bank*, 6 Hill, 297; *Marzetti v. Williams*, 10 Barn. & Ad. 415; *Watson v. Phoenix Bank*, 8 Met. 217.

(2) *Watts v. Christie*, 11 Beav. 546; *Coffin v. Henshaw*, 10 Ind. 277; *Walker v. Rostron*, 9 M. & W. 421.

(3) *Munn v. Burch*, 25 Ill. 35; *Chicago Ins. Co. v. Stanford*, 28 id. 168; *Byles on Bills*, *21 Sharswood's note (Sharswood's ed.).

he knew, or had reason to believe, that the customer's order was given in promotion of an unauthorized purpose. For example, the banker is not justified in refusing to honor the depositor's check, because he knows or believes that the check is an appropriation of funds to a person, or for a purpose to whom or for which the depositor is not lawfully authorized to appropriate these funds. For if the banker should look into this matter he would make himself improperly a party to an inquiry between his customer and a third party. (1) It is enacted that a Bank shall not be bound to see to the execution of any trust, whether expressed, implied, or constructive, to which any deposit made under the authority of this Act may be subject; and except only in the case of lawful claim by some other party before repayment, the receipt of the person in whose name any such deposit stands, or, if it stand in the name of two persons, the receipt of one, and if in the name of more than two persons the receipt of a majority of such persons, shall be a sufficient discharge to all concerned for the payment of any money payable in respect of such deposit, notwithstanding any trust to which such deposit may then be subject, and whether or not the Bank sought to be charged with such trust (and with whom the deposit may have been made), had notice thereof; and no such Bank shall be bound to see to the application of the money paid upon such receipt, any law or usage to the contrary notwithstanding. (2)

Whether a Bank would be protected in honoring a check, which to its knowledge has been given for the purpose of compounding a felony, is doubtful. But the personal knowledge of so material a fact by the President of a Bank in his individual capacity would not be considered knowledge by the Bank. (3)

One McE., who was the assignee of an insolvent estate, kept the estate account as well as his own private account at the defendants' Bank. Certain notes of the estate were depo-

(1) *Grey v. Johnson L. R.*, 3 E. & T. App. 11. *Keane v. Robarts*, 4 Madd 357.

(2) Section 65, sub-section 2. See *Molson's Bank v. Corp. Town of Brockville*, 31 C. P. R. Ont. 174.

(3) *Bank of Montreal v. Rankin*, 4 L. N. (1881).

sited by him with defendants for collection, and the proceeds placed to the credit of the estate, which McE., as assignee, drew out by check and re-deposited with defendants to his own private account, and then used for his own purposes. It did not appear that the Bank derived any benefit from the transaction, or that McE. was indebted to them: *Held*, that defendants were not liable to repay the amount to 'he estate. (1)

But where the depositor sought to pay his own debt to the Bank by an appropriation of funds to his credit "in trust" with the banker, the banker was compelled to refund. (2)

Where money deposited, or any unpaid balance thereof, is lawfully claimed as the property of some party other than the depositor, the Bank may require the consent of the claimant before repayment to the depositor, or the consent of the depositor before payment to the claimant. And this notwithstanding any law, usage or custom to the contrary. (3)

Where moneys have been deposited from time to time in a Bank to the credit of A, of whom the Bank was creditor to an amount far exceeding the balance of such deposits, and on the understanding that such deposits were to enure to the benefit of the creditors of A, generally, B and others cannot legally sue the Bank to recover a proportion of such deposits, on the ground that a portion of said moneys really belonged to B and others in the absence of any notice to or knowledge by, the Bank of the existence of any such right on the part of B, and others, whilst such deposits were being made. (4)

DUTY TO PAY A CUSTOMER'S NOTES, PAYABLE AT BANK.

As it is the duty of the Bank to pay its customer's checks, when in funds, so at least it has authority, if it is not actually under obligation to pay his bills, notes, and acceptances,

(1) *Clench v Consolidated Bank of Canada*, 31 C. P. 169.

(2) *Grey v. Johnston*, 3 L. R. H. L. Cas. 14, per Lord Westbury.

(3) Section, 65.

(4) *La Banque Jacques Cartier v. Giraldi & vir.*, 26 L. C. J., 110.

drawn on, or made payable or negotiable at, the Bank. (1) For it is a presumption of law that if a customer does so draw upon, or make payable or negotiable at, his Bank any of his paper, it is his intent to have the same discharged from his deposit. It is his order to pay, equally with his check; and if the Bank pay, without express orders to the contrary, it shall be protected in so doing, and it shall be a good defence to a suit by the depositor. Nay, it has been said that, if the Bank refuse to pay, it shall be liable in damages, in like manner as for its refusal to pay the check of a customer when in funds sufficient to do so. But in case of its refusal to pay an acceptance the writ shall lie in favor of the acceptor only, and not in favor of the drawer; for it is to be supposed that the acceptor provided the funds; and further it would seem that at any rate the payment could be properly made only from his funds, since it was at least *prima facie* his duty, and not the drawer's, to supply the means of payment. (2)

If the banker at whose counter the bill or note of his customer is made payable has not at the time for payment a sufficient amount for this purpose to the credit of the customer, but if, nevertheless, he pays the bill or note, making up the deficit from his own funds, he will be entitled afterward to recover the amount so advanced by him, as money loaned to, or paid for the use of, the customer. (3) Though, of course, if the signature of the payee, or of the customer, be forged, the banker has lost his money. (4)

SUIT BY DEPOSITOR FOR HIS BALANCE. PRESCRIPTION.

The indebtedness of the Bank being an ordinary indebtedness at common law, the statute of limitations (Prescription)

(1) *Kymer v. Laurie*, 18 L. J. Q. B. 218; and see *Woods v. Thiedeman*, 1 H. & C. 478.

(2) *Thatcher v. Bank of State of New York*, 5 Sandf., 121; *Griffin v. Rice*, 1 Hilt., 184; *Mandevile v. Union Bank*, 9 Cranch, 9. In this last case it was held that a bank was authorized to *advance* on the drawer's account the money called for by his bill or draft.

(3) *Forster v. Clements*, 2 Camp. 17; *Mandevile v. Union Bank*, 9 Cranch, 9.

(4) *Ibid.*; *Cocks v. Masterman*, 9 B. & C. 902.

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will run against it, as against any other simple debt. But when the statute will begin to run has not been as yet conclusively settled. In *Union Bank v. Knapp* (1), it was said that the statute would begin to run from the date of the last balancing of accounts, as in the depositor's Bank book, if no subsequent transaction should be had between the parties. This though a strict corollary from the rule, that the Bank's liability to the depositor is a simple debt, does not seem well founded either in reason or in sound law. In the case of a naked debt, the statute never begins to run before a right of action on behalf of the claimant or creditor has accrued. If this be a sound principle, it is conclusive of the present question. For debt though it be of the Bank to the depositor, it is not such a naked debt that it can be sued upon by the depositor at any moment. The authorities are numerous and overwhelming that the depositor's right of action does not come into existence until after he has made a demand upon the Bank, which there was an implied and valid understanding between them in the outset that he should make, (2) or until some act of the Bank has waived such demand. (3) The duties of demand and of payment are reciprocal. Surely then the legal results of these rights should be reciprocal likewise. If the depositor cannot sue till he has demanded payment *e converso* he should not lose his right to sue till payment has been refused; for until that time he has a right to suppose that the original agreement between himself and the Bank, which was entered into for their mutual advantage and profit, and from which his refraining from demand is enabling the Bank to reap an unusually great advantage and large profit, is still subsisting in unbroken force.

(1) 3 Pick 96.

(2) *Downes v. Phoenix Bank*, 6 Hill, 297; *Adams v. Orange Co. Bank*, 17 Wend., 514; *Johnson v. Farmers' Bank*, 1 Harring. 117; *Girard Bank v. Bank of Penn. Township*, 39 Penn. St. 92; *Union Bank v. Planter's Bank*, 9 Gill & J. 439; *Watson v. Phoenix Bank*, 8 Met. 217; *Bellows Falls Bank v. Rutland County Bank*, 40 Vt. 377.

(3) *Farmers' & Mechanics' Bank v. Planters' Bank*, 10 Gill & J. 422; *Planters' Bank v. Farmers' & Mechanics' Bank*, 8 id. 449; *Bank of Missouri v. Benoist*, 10 Mo. 519; *Cooper v. Mowry*, 16 Mass. 7.

The acts which have been held to waive demand by the depositor are: 1. Notification to him by the Bank that his claim will not be paid, (1) 2. The rendition to him by the Bank of an account, in which it claims the money as its own. (2) 3. Suspension of specie payment and discontinuance of banking operations by the Bank, with knowledge thereof by the depositor, (3) 4. Suspension of payment and closing the doors of the Bank. (4)

LIEN OF BANK ON FUNDS OF DEPOSITOR.

The rule may be broadly stated, that the Bank has a general lien on all moneys and funds of a depositor in its possession for the balance of the general account. Of course, so long as the balance is in favor of the depositor, the lien has no vitality in it. But when payment upon an overdraft, a discount, an acceptance, or other species of advance or loan by the Bank to him creates an indebtedness on his part, all the funds which the Bank has or obtains to his credit may be applied upon such indebtedness until it is fully discharged.

The funds thus applicable have been said to be not alone the general deposit of the customers, but any business paper, as notes or bills, belonging to him and which he has intrusted to the Bank for collection. (5)

Upon precisely what property of the customer in the possession of the Bank the lien will attach is a subject upon which there have been but few decisions in America. In England, where persons possessed of an independent property are wont to place many things of value in the custody and charge of their bankers, in a manner not so much practised here, the decisions have been numerous.

The English cases eliminate from the operation of the lien all property which comes into the banker's hands plainly ear-

For notes to 1-4, see Mørse on Banks and Banking, 42.

(5) *Ex parte* Pease, 1 Rose, 232; *Ex parte* Wakefield Bank, 1 id. 243; 19 Ves. Jr. 25. But see Lord Bolingbroke's case, in *Joy v. Campbell*, 1 Sch. & Lef. 346.

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marked or appropriated for any special purpose. A customer's security, specifically stated to be for the amount "which shall or may be found due on the balance of his account," was held to be security for the then existing balance only, and not to be applicable upon the subsequent floating balance. (1) In like manner, a security specifically given for a contemporaneous advance of one thousand pounds by the banker was held not to be applicable against an independent indebtedness of five hundred pounds, afterwards arising upon the ordinary running account. (2) It seems, too, that the deposit should be made with the banker in his character as such, and should not be in the nature of a special deposit for a particular purpose not connected with the banking business. Thus, for example, a chest of plate confided to the banker, not as a banker but as a custodian, merely for safe custody in his vaults, was held not subject to the lien. (3) Neither will the lien attach on securities left with the banker by mistake or casually; as where they were delivered as part of an application for a further loan, for which they were expected to serve as security, but which he refused to make; (4) and, if title-deeds comprising two distinct estates are left with a banker, with a memorandum pledging one of them as security to him, this precludes the idea of any pledge of the other, and no lien will attach thereon. (5)

Neither shall the banker have his lien upon property subject to a trust and improperly left with him or pledged to him by the trustee without notice of the trust; unless, indeed, the *cestui que trust* shall have done some act or been guilty of some negligence such as to deprive him of his counter rights. (6) But if the trust property consist of bills

(1) *In re Medewe*, 26 Beav. 588; 28 L. J. Ch. 891.

(2) *Vanderzee v. Willis*, 3 Brown C. C. 21; *Zinck v. Walker*, 2 W. Bl. 1154.

(3) *Ex parte Eyre*, 1 Ph. 235; *Brandao v. Barnett*, 12 Cl. & F. 809; *O'Connor v. Majoribanks*, 4 Man. & G. 435.

(4) *Lucas v. Dorrein*, 7 Taunt. 279.

(5) *Wylde v. Radford*, 33 L. J. Ch. 51.

(6) *Manningford v. Toleman*, 1 Coll. 670; *Stackhouse v. Countess of Jersey*, 30 L. J. Ch. 421; *Murray v. Pinkett*, 12 Cl. & F. 764; *Locke v. Prescott*, 32 Beav. 261.

or notes, payable to bearer, or other property transferable by delivery merely, and be not ear-marked as trust property, if the customer deposit them as if they were his own, and the banker receives them in due course, *bona fide*, and with no notice of the trust, he shall hold them under his lien. (1) Though it has been held, that if A. delivers promissory notes to B., to get discounted for him and B. takes them to his own banker for that purpose, who insists on placing them to the credit of B., B.'s account then showing a balance against him, equity would still compel the banker to account to A. (2)

Where a depositor keeps several accounts with his banker, as, for example, a general account, a loan account, and a discount account, all being in fact kept by him in his own right, nothing short of a clear and distinct contract to that effect will prevent the Bank from fastening its lien upon any securities it may obtain for reimbursement of any of these accounts which may be overdrawn. (3)

The lien of the Bank does not attach until some indebtedness is actually in existence and matured. Thus, a Bank holding a note of a depositor has no right of set-off, and no valid lien before the note matures : so that it has been held, that if, in the interval before the maturity, the depositor makes an assignment of his funds, without the knowledge of the Bank, but otherwise legal, the amount of his balance will pass to the transferee. (4) This is at strict law. But it would seem that in equity the Bank might have a safeguard. The case has arisen where a depositor's note had been discounted by the Bank, before its maturity he died ; at the time of his death the amount of his deposit exceeded the amount of the

(1) *Barnett v. Brandao*, 6 M. & G. 630.

(2) *Grant on Banking*, 307 ; *Lord Bolingbroke's Ca. in Joy v. Campbell*, 1 Sch. & L. 346.

(3) *In re European Bank*, 8 L. R. 41 ; and see *Pedder v. Preston*, 9 Jur. N. s. 496 ; 11 C. B. N. s. 535, *ante*, p. 34.

(4) *Giles v. Perkins*, 9 East, 12 *per* Ld. Ellenborough ; *Beckwith v. Union Bank*, 4 Sandf. 604, is sometimes cited to the same point, but it is not a very satisfactory authority.

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note; by a court of equity it was held, upon application by the Bank, and proof of danger of the insolvency of his estate, and also of the indorsers on the note, that equity would allow the Bank to retain enough of the deposit to meet the note; though it was said, in law the debt *in futuro* could not be set off against the debt *in presenti*. (1) And this seems sound justice.

If the debt be mature at the time of the debtor's death, the Bank has the right of set-off as against the heirs, executors, and administrators of the deceased, whether the estate be solvent or insolvent, precisely as it would have enjoined the same right against the customer himself in his lifetime. (2)

A Bank, holding a note of a depositor, is under no obligation to appropriate a sum sufficient to meet it from his funds or deposit, immediately upon its maturity, or indeed at any other particular time; they may let the account run on, and take the chance that they will not lose it in the end. (3) They are, however, at liberty at any time after maturity to make such appropriation, especially if the depositor seeks to withdraw his funds, or so much of them as not to leave a balance equal to the amount of the note. Whether or not they could charge interest for the period during which their own neglect has allowed their debt to remain uncollected is a question which has never been passed upon. Probably they could do so. In a Canadian case already cited the Court recognized this principle, and held that a Bank may refuse to pay a check even if the depositor really has funds to his credit, when, by paying, the Bank will be exposed to loss for a debt matured but not charged against the depositor's account. The depositor was indebted to the Bank on a demand note for \$2,000, which had been taken to show an indebtedness due to the Bank for an advance made on the security of a quantity of corn transferred to the Bank accord-

(1) 3 Leigh, 695.

(2) State Bank *v.* Armstrong, 4 Dev. 519.

(3) Marsh *v.* Oneida Bank, 34 Barb., 298. But see McCagg *v.* Woodman, 28 Ill. 84.

ing to law and custom. The depositor was authorized as agent for the defendants to sell the produce on their account, and after a partial remittance of \$1278 drew a check for \$700, transferring it for value to a third party who sought to enforce payment. The note being payable on demand and at the Bank's counter was deemed exigible without presentation elsewhere than at the Bank. It matured in consequence, and the Bank was not obliged to make other advances or payments to the drawer in the matter, he being still their debtor to a considerable sum. The entries made on the Bank books showing funds were said only to explain the transaction and put it in the ordinary form. (1)

Liability of every kind mature upon insolvency, and the Bank may exercise its right of set off *instantly*.

It appears that however objectionable it may be as a hardship upon the debtor, yet it is a strict legal right of a Bank holding a depositor's note and sufficient of his funds to meet it at or after maturity, to refrain from applying these funds to this purpose, and to put the note in suit. But as towards third parties the obligation upon the Bank is different; and it has been decisively and properly held that the neglect of the Bank to make such an appropriation of the principal's funds would discharge the endorsers and sureties. (2)

On the other hand it has been held that, where the maker of a promissory note is a depositor with the Bank which holds it, and the note is dishonored and duly protested and indorsers notified, the Bank is not bound to apply towards payment of the note, any sum (though sufficient to pay the note), which the maker may subsequently deposit, generally, upon his current account. The making of such a deposit, and failure by the Bank to apply it in payment of the note, does not discharge the indorser. It is optional with the Bank whether to make such application or not; and the intention of the maker of the note, so far as it can be inferred from the

(1) Marler v. The Molsons Bank, 2 L. N. 166 (1879).

(2) McDowell v. Bank of Wilmington & Brandywine, 1 Harring, 369; Dawson v. Real Estate Bank, 5 Pike, 283.

circumstances, would clearly appear to be contrary to any such use of the money. (1)

The lien and the right of set-off only exist where the individual, who is both depositor and debtor, stands in both these characters alike in precisely the same relation and on precisely the same footing towards the Bank. The Bank can claim no lien on the deposit of a partner, made on his separate account, in order to set off the same against a debt owing them from the firm; (2) and this not even if property, specifically pledged to the Bank by the partner on his separate account, afterwards becomes the property of the firm. Even then, if the firm fails, the banker can hold the property thus pledged solely as security for any separate indebtedness of the individual partner. (3) Neither can the individual partner and the firm so shift their respective credits and debits as to set them off, the one against the other, when the Bank itself is insolvent. (4)

IN WHAT FUNDS DEPOSIT AND REPAYMENT MAY BE MADE.

As a general rule, the depositor, having once brought his funds securely into the hands of the proper officer, and having duly received his credit for the amount in dollars and cents, has thereafter a perfect claim on the Bank for this amount, *in money*. (5) One of the cited cases shows that when a deposit was made in good faith of the bills of a Bank, supposed at the time by both parties to be solvent, but which had in fact already stopped payment, and the amount was in ordinary course passed to the credit of the depositor as so much money, so many dollars, the Bank was held to repay the amount in good money; although it was shown as a fact that the bills had been kept by themselves and not mingled with the general funds of the Bank, and that they still continued

(1) National Bank of Newburgh v. Smith, 66 N. Y. 271.

(2) Watts v. Christie, 11 Beav. 546.

(3) *Ex parte McKenna*, 30 L. J. Bank, 20.

(4) Watts v. Christie, 11 Beav. 546; 26 L. J. Ch. 711.

(5) Thompson v. Riggs, 5 Wall. 663.

so when the insolvency of the issuing Bank was discovered, when the receiving Bank promptly sought to undo the credit. This seems a hard rule, contrary to the analogy of deposits in forged bills or base coin, and is not in accord with the general run of decisions in Canada. It has been held in Ontario, that if a customer pay to his account with his banker notes of a Bank which has failed, and the Bank is guilty of no laches, the loss falls on the customer. But in all cases where the Bank seeks to return notes so deposited, it must do so within a reasonable time. (1)

If the deposit be made in forged paper or in base coin, although the nominal amount be duly passed to the depositor's credit, yet no indebtedness shall accrue; for a deposit made in such material is not a payment, and can in no wise affect the relationship previously existing between the parties. It goes absolutely for nothing; and as it is a familiar rule that the transfer of such worthless stuff could not discharge a debt, so on the other hand it is equally clear that it cannot create one. (2) In like manner it would seem that the Bank would be entitled to defend in a suit by the depositor by showing misrepresentation, concealment, or other species of fraud on his part.

Where the payment into the Bank is made in its own bills, or in bills purporting to be its own, if the Bank receives them and gives credit for them, it cannot, after the lapse of several days, repudiate them and annul the credit, on the ground that the bills were forged or fraudulently altered. (3) This rule is based on principles of a sound public policy. A banker is held to know his customer's handwriting; the acceptor of a bill of exchange is held to know the drawer's handwriting. Vastly more strong are the reasons for holding a Bank to know its own bills.

(1) *Conn. v. Merchant's Bank*, 30 C.P.R. Ont. 387. *See post*. Chap. IV.

(2) *Bank of United States v. Bank of Georgia*, 10 Wheat. 333; *Corbit v. Bank of Smyrna*, 2 Harring. 235; *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *Jones v. Ryde*, 5 Taunt. 488; 1 Com. Law, 166; *Markle v. Hatfield*, 2 Johns. 455; *Young v. Adams*, 6 Mass. 182; *Willson v. Foree*, 6 Johns. 110.

(3) *Bank of the United States v. Bank of Georgia*, 10 Wheat. 333.

It seems, however, and it is certainly a reasonable rule, that if the bills were paid in and credit was given at once in the hurry of business hours, and that if on the first possible opportunity afterwards on the same day the Bank officers should examine the bills, find them forged or false, and at once notify the depositor, the repudiation would be in time to save the Bank, at least unless the depositor had suffered substantial injury by reason of the delay. The Bank should have a reasonable time to examine the bills; and though this limit of reasonable time should be construed with great strictness and so as to hold the Bank to great promptitude, still it could hardly be said that the receiving officer should pause in the midst of business hours to examine the marks of identification on each one of a large number of bills. It has been well said that in such cases the Bank must be allowed to put some, at least temporary, confidence in its customers.

BANK-BOOKS OR PASS-BOOKS.

The custom is probably universal in this country for every depositor with a Bank to have his bank-book, so called. In England the same thing is called a "passage-book" or "pass-book." It is hardly necessary to describe anything so familiarly known.

Ordinarily, whenever a deposit is made, the bank-book is presented at the Bank counter, for the purpose of having the amount and date of the deposit contemporaneously entered therein by the Bank clerk or teller. At intervals, also, it is sent into the Bank to be balanced by the proper officer, after which it is returned to the depositor, customarily accompanied by all his checks which have been paid by the Bank since the date of the next preceding balancing. It will be seen that the chief value of the book is that the depositor may have a species of check upon the Bank, and may use it as evidence upon the occurrence of any dispute and lawsuit. The entries in the bank-book, made by the proper officer, bind the Bank as admissions. Especially the balancing of the book is conclusive upon the Bank in the same manner

as an account stated. But the entry of credit for a deposit is held to be an original entry only on the supposition that, as in the ordinary course of business above described, the book accompanied the deposit and the entry was made by the teller simultaneously with the receipt of the money and as part of the same transaction. For if the book was sent to be written up afterwards from the books or memoranda in possession of the Bank, the entries are not original, and may be examined into. (1) But the entry of the credit is, after all, only a receipt. It is *prima facie* evidence against the Bank, and binds it like any other form of acknowledgment or receipt. (2) But apparently it binds it no more; and as a receipt it is open to explanation by evidence *aliunde*. So that if the Bank succeeds in showing clearly that the entry is a mistake, it will no longer be binding. (3) If the correctness or incorrectness of the entry be disputed between the customer and the Bank, a question of fact is thereby made for the jury. (4)

But the most difficult questions arise in considering to what extent the bank-book can be regarded as binding upon the depositor. In the simple case of an erroneous entry by the receiving teller, of course the customer may insist upon correction. Even where, when making his deposit, he also hands in with it the ordinary memorandum, stating what sums he is depositing, and the receiving teller's entry corresponds with this memorandum, he may afterward be allowed to show that both his memorandum and the entry were wrong, and gave him credit for too small a sum. For the Bank is in fact liable for precisely the amount of money it receives. It is the act of receiving which by itself creates and perfects the debt, and which alone need be shown. The receipt therefore is open to correction in favor of the depositor, if it

(1) *Manhattan Co. v. Lydig*, 4 Johns. 377.

(2) *Union Bank v. Knapp*, 3 Pick. 96; *Commercial Bank of Scotland v. Rhind* 1 Macq. H. L. Cas. 643; *Shaw v. Dartnall*, 6 B. & C. 57.

(3) *Shaw v. Picton*, 4 B. & C. 715.

(4) *Snead v. Williams*, 9 L. T., N. S., Exch. 115.

be erroneous. The actual fact of the real deposit is alone absolutely conclusive. This rule of law is rigid, and can only be dispensed with by the express agreement of the parties. It cannot be infringed or modified by reason of any orders or by-laws of the Bank. (1) When, however, the book has been balanced by the Bank officer, has been returned to the depositor together with his checks, and has been retained by him for any length of time without objection, the matter becomes less clear upon principle, and the decisions are, perhaps, not wholly harmonious. The object which the Bank declares itself to have in view is to put the depositor in the way promptly to discover and demand correction of any mistake existing in its account with him. Accordingly it has been held in England that the silence of the customer, for a reasonable time after receiving back his books and checks, would be deemed an admission on his part of the correctness of the balance. (2) It is not that his right to have the book amended to agree with the fact has been modified; but that he has lost that right altogether by reason of his own laches in failing to demand the amendment earlier.

On an action on a deposit account kept by the plaintiff in the defendants' Bank for the sum of \$1,732.18, which had been charged against the plaintiff in his pass-book and in the Bank ledger, but which he declared he had never withdrawn, the plaintiff, before bringing his action, had called on the defendants to produce the check, but this they had failed to do, although by their plea they alleged that all the plaintiff's checks had been returned to him. Defendants, in fact, admitted that the check had been mislaid, but sought to prove by evidence that the check was drawn by plaintiff and paid by themselves. It was certain that it had been paid, and the evidence as to the mode of paying it was as follows. The clerk to whom the disputed check was presented, and by whom it was accepted says: "A few days before the 16th of January, a low-sized man, whom I

(1) *Mechanics' & Farmers' Bank v. Smith*, 19 Johns. 115.

(2) *Devaynes v. Noble*, 1 Meriv. 541.

"did not know, presented the check. I ascertained that "there were no funds to pay it. I submitted it to Mr. H., "and he told me to tell the man to present it again, as he "presumed it would then be all right. I told this to the "man. He replied that it was strange, as the plaintiff had "written to him or told him that there were sufficient funds. "A day or two afterwards, a deposit was made to the credit "of the plaintiff, and two days after the same person return- "ed with the check, and said, 'I suppose it is all right.' I "said, 'Yes.'" The witness also said he knew the plaintiff's signature, and was positive that it was his writing at the foot of the check, and being now examined for the defendants, said he was not sure if he had ever before seen the person who presented the check, but thought he was familiar with him. The clerk who paid the cheque saw nothing to distinguish the signature from the ordinary signature of the plaintiff, and besides, while, in his examination for the plaintiff, he said that he did not know the person who presented the check, in his second he said he was not sure, but thought the person familiar to him. The court would have deemed that evidence sufficient to establish the genuineness of the check, if it remained, as now, uncontradicted, and if the check made part of the record. But the defendants, by their negligence in losing the check, had made it impossible to contradict their evidence, and it was, therefore, incumbent on them to make it morally certain that even if the check were in the record their evidence could not be contradicted. This they had failed to do, though there were circumstances which confirmed the parole evidence. Thus the pass-book was sent to plaintiff on the 27th July, 1871, and showed a balance of only \$4.44, whereas, according to his pretension, the balance should have been \$1,736.62; and on the 3rd August, 1871, the defendants wrote to him that his account was overdrawn, and that if there were any errors he should let them know, when, according to his pretension, there should have been a balance of \$1,719.62 in his favor. They also again drew attention to the state of his account

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on the 30th August, and it was strange that plaintiff did not answer these letters, nor complain for several months afterwards though the disputed check was dated 16th January, 1871. But when he saw the pass-book, and that it had not been balanced for seventeen months, during which time plaintiff had made deposits to the amount of \$12,637, this oversight did not appear so unaccountable as at first. His conduct was, at all events, most careless; but the defendants were also chargeable with grave carelessness, and he did not think the plaintiff ought to be made answerable for the check they had mislaid. He did not pronounce that the check was forged, but that he could not on the evidence declare it genuine, and therefore must give judgment for plaintiff, saving their recourse to defendants if they should find the check. (1)

INTEREST ON DEPOSITS.

Ordinarily, a general deposit with an incorporated Bank in this country does not bear interest. It is, however, a proper subject for a special agreement or understanding between the parties.

In casting interest or making the charge to the drawer, it is clear that the banker must debit the drawer of a check, not from the date of the drawing but from the date of the actual payment of the check. (2) It has been said that the accepting of a check payable at a day future is equivalent to a loan, by the drawer to the banker, of the amount named, for the interval. Following this principle, it would practically amount to a debiting at the time of payment. For if the debit were made at the time of acceptance, yet the acceptance, creating at once a loan from the depositor to the banker for the interval, would cause interest to run on the same sum, for the same period at the same rate per cent., from the banker to the customer, and the one amount would exactly offset the

(1) *Fournier v. Union Bank, S. C. 1873 (Que).*

(2) *Goodbody v. Foster*, cited to this point in *Byles on Bills*, Sharswood's ed., p. 25.

other. But since the acceptance only binds the banker, at his own peril, to have funds enough of the depositor to meet it when payment is demanded, and as until such demand he has the full use of such funds, it would seem interest should in reason be calculated to the date when demand may be made.

If the banker accepts the check some time before actually paying it, it has been decided that he may debit the drawer from the date of the acceptance. (1) In this case the plaintiff, a merchant having a deposit account with the defendants claimed the sum of \$168.98 as the balance due him, including interest at a stipulated rate of six per cent. The defence of the Bank was that only \$18.89 remained due, which it tendered. The question between the parties arose as to the interest on \$15,131, amount of two checks, one for \$10,000 presented August 7, and the other \$5,131, presented August 8, and certified good by the Bank, but not paid until October 8 following. The plaintiff contended that he was entitled to interest until payment, while the Bank said the interest stopped at the time the checks were presented and certified. The Court maintained the pretension of the defendants and gave judgment only for the amount tendered. The grounds of the judgment were that the two checks drawn by the plaintiff were certified good by the defendants in the usual course of banking business, and the amounts were charged to the drawer, the holders of the cheques taking possession of them so certified. As between plaintiff and defendant, the operation is as much the same as if the Bank had paid the money instead of certifying the checks. The obligation of the Bank was to pay to any holder of the checks who asked for the money, and it had afterwards paid the amount to a third party. The plaintiff ceased to be entitled to any interest after the funds had been so withdrawn from his name.

The books of the Bank are admissible evidence in its behalf as against a depositor, or one who has been a depositor.

(1) *Wilson v. Banque Ville Marie*, 3 L. N. 71, 1880.

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But when offered by the Bank, the entries must be proved by the evidence of the clerk who made them, or if he be dead or inaccessible, then by proof of his handwriting (1). So too the cashier of the Bank is competent to prove the amount of a deposit in favor of the Bank, certainly, if the Bank releases him from any possible liability he may be under to it for any mistake or misconduct of his own in the matter; and perhaps so even if the Bank does not thus release him (2).

It has been held in England, that the name in the Bank-book is not conclusive as to the person with whom the Bank contracted. If money be deposited by A, in his own name, B may recover from the Bank by showing that the deposit was in fact made upon his account, that he was the principal and the real lender, creditor, or depositor. But the evidence to this effect must be very clear and explicit (3).

DEPOSIT RECEIPTS.

A certificate of deposit or a written acknowledgment of the Bank, that it has received from a certain person a stated sum on deposit, is an instrument occasionally issued. Chiefly it is given to persons not regular customers of the Bank and not designing to become such, but who have for some reason, and on an isolated occasion, desired to leave a sum of money in the custody of the Bank. Sometimes, though more rarely, a regular customer, having some special object to subserve, may desire such a certificate. In form it is substantially a simple receipt of the Bank, and as such, like a pass-book, is only evidence of an indebtedness.

A certificate of deposit may or may not be made negotiable. It may be made payable to A. B, when it is not negotiable. It may be made payable to A. B. or order, when it is negotiable by endorsement. Or it may be made payable to A. B. or

(1) *Union Bank v. Knapp*, 3 Pick. 96; *Watson v. Phoenix Bank*, 8 Met. 217. *Johnson v. Farmers' Bank*, 1 Harring. 117.

(2) *Johnson v. Farmers' Bank*, 1 Harring. 117.

(3) *Sims v. Bond*, 5 Barn. & Ad. 389.

bearer, when it is negotiable by simple delivery. Considerable discussion has taken place in Canada and the United States as to the legal character of a document of this kind. On the one hand it has been held that such an instrument has all the attributes of a promissory note; on the other, that it is but an acknowledgment of a deposit, and, although it may be made payable to order, is still not negotiable in the strict legal sense of the word. Certain provisions, imparting conditions and contingencies incompatible with the certainty required in a promissory note, inserted in such documents give occasion for argument against the pretension of negotiability. Such, for example, the provision that the deposit is not to bear interest unless it remains three months at least in the Bank; and that the amount is not to be withdrawn until after the giving of fifteen days' notice, interest to cease from the date of such notice. In answer to this objection it has been argued, and with considerable force, that the provision as to interest merely prescribes the time when it was to commence and cease; and that the stipulation for fifteen days' notice introduced no more uncertainty into the promise than occurs in a bill payable so many days after sight.

Several cases have come before the courts in Ontario on instruments drawn out after this form, and it has been held that neither in law nor in equity can the holder by endorsement demand payment of the fund secured by it. (1) A similar decision was arrived at in a case which came before the courts in Quebec. (2) On appeal being had to the Privy Council, it was there stated that high authority could be cited in favor of the opposite contention; and although this vexed question did not call for solution in the cited case, the result turning on other grounds, their Lordships were of the opinion that deposit receipts were in fact equivalent to promissory notes, and if made payable to order, negotiable

(1) *Mander v. Royal Canadian Bank*, 20 C. P. Rep., Ont. 123; *Lee v. Bank of British North America*, 30 C. P. Rep., Ont. 255.

(2) *Richer v. Voyer et al.* 13 L. C. J. 30.

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by indorsement. (1) This also seems to be the holding of the highest authorities in the United States. (2)

But the provisions of the law governing the sales of debts and rights of action in general can at all times be taken advantage of to avoid any doubts as to the right of a transferee for value to sue the Bank on a deposit receipt. These provisions call for a signification of the transfer to be made to the Bank and a copy of it delivered. An acknowledgment of the notice of transfer by the Bank would of course render the holder's right more secure. (3)

Where the certificate, as is not unfrequently the case, states that the amount is payable "on the return of this certificate," or on its presentment, or other such phrase, this language does not alter the legal effect of the instrument. As a promissory note, naming no place of payment,—for a heading, with the name of the Bank is not such a naming,—its maker the Bank, is bound to find it out and offer to pay it; and not till then can a return of it be claimed. Neither is the holder generally deemed to be under any obligation to present it for payment before suit upon it. (4) Though where a certificate was given to A., "payable to order of himself on presentation of this certificate properly indorsed," the court regarded this as so far an ordinary deposit that A. could not sue the Bank upon it without previous demand. (5)

A condition on a Bank deposit receipt, that the receipt, should, on payment, be given up to the Bank, may not be void; but it does not entitle the Bank to retain the money

(1) *Richer v. Voyer et al.*, 3 Rev. Critique, 444.

(2) See *Morse on Banks and Banking*, 64 et seq.

(3) In the cited case of *Mander v. Royal Canadian Bank* a plea for defence on equitable grounds was held to be good, which averred in substance that the plaintiff had for good and valuable consideration transferred all his right, and interest at law and in equity, by endorsement on the receipt and delivery to the persons named in the plea to receive and demand payment of the fund, with the intention of passing to such person all his right and title to the money represented by the receipt, which money the defendants had paid over to the transferee.

(4) *Hunt v. Divine*, 37 Ill. 137; *Smilie v. Stevens*, 39 Vt. 315, affirmed in *Bellows Falls Bank v. Rutland County Bank*, 40 id., 337.

(5) *Bellows Falls Bank v. Rutland County Bank*, 40 id., 377.

in case the receipt is not forthcoming. The depositor is entitled, on proof of loss and indemnity (if required) to relief in equity (1).

Ordinarily, the signature of the cashier to the certificate is sufficient. Though it is a contract in strict law, and though statutes often designate the manner in which "contracts" shall be signed, yet the phrase thus used in the statutes has, by sheer force of necessity and common sense, been construed by the courts not to apply to those instruments, which by the daily course of business in all banking institutions the cashier alone is wont to execute, and among which the simple receipt and promise to repay, which constitute a certificate of deposit, are to be included.

SECT. 2. OF CHECKS.

A check is the instrument by which, customarily, a depositor seeks to withdraw his funds, or any part thereof, from the Bank. It is a draft or order on the Bank requiring it to pay a sum named. It may be made payable "to bearer," or to "A. or bearer," or to "A. or order," or "to the order of A." In the two latter forms it must be paid to A. in person, or to one deriving title from him through his indorsement. It is customary to indorse even when the payee makes the presentment and demand, the indorsement then having the effect of a receipt. The rules governing indorsement in cases of bills of exchange, promissory notes, and other business paper made payable to order, govern checks also. (2) Thus a check may be indorsed generally, or in blank, or to the order of B., who again may indorse generally, or in blank, or to the order of C. Any *bona fide* holder of the check indorsed in blank may fill in a special direction above the indorsement, making it payable to himself or order; and in suing thereon, though he has not written in such direction, he may declare upon it as indorsed to himself, and will sufficiently

(1) Bank of Montreal v. Little 17 Chy. Ont. 685.

(2) C. C. L. C., Art. 2349.

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support his declaration by showing that it was indorsed in blank, and that he is the holder for value and in due course of business.

If a Bank refuses, without sufficient excuse, to pay a check of its depositor, it is liable to him (as will be seen hereafter) in substantial damages. (1) It is therefore of the first importance that it should be clearly understood by the paying officers of Banks what are essential requisities going to the validity of a check, and what are merely customary formalities which may yet be legally dispensed with. For if the check be lacking in any of the former class of characteristics, the Bank is not only justified in refusing to pay it, but if it does pay it, and there turns out to have been anything wrong about it, rendering the payment improper, the Bank must bear the loss, and restore to the drawer's credit the amount paid. But, upon the other hand, though some of the latter class of characteristics may be wanting, yet the Bank is not thereby excused from its obligation to pay; for the order being good at law, though in an unusual form, is competent to draw the money of the depositor. If the Bank refuses to pay upon such an order, it must still, in strict law, be held to answer in damages. Clearly this is the logical sequence of the reasoning, and yet, though there is now no judicial authority for saying so, it seems highly probable that in cases where this rule would operate with excessive and unreasonable severity upon the Bank it may be relaxed.

FORM AND CHARACTERISTICS.

At common law no precise form is indispensable to the validity of a check, though there are some few elements which are essential and which must be present to secure its legal sufficiency.

1. *Signature of the Drawer.*—In the first place the signature of the drawer is necessary. (2) But it is not indispen-

(1) *Marzetti v. Williams*, 1 B. & Ad. 415; 1 Tyr. 77, n. (b) S.C.; *Rollin v. Steward*, 14 C. B. 595; *Cumming v. Shand*, 29 L. J., Exch. 129.

(2) *Taylor v. Dobbins* 1 Strange, 399; *Saunderson v. Jackson*, 2 B. & P. 238; *Grant on Bankers and Banking*, 27.

sable that this signature should appear in the ordinary form at the foot of the check. It may be embodied in the instrument, as for example, "I, A. B., direct," or "A. B. requests." If it be thus written in an order, otherwise sufficient and in the handwriting of the drawer, it is enough. The handwriting of the drawer is the safeguard of the Bank, and any order having the legal requisite and signed by him or by his attorney, whose power has been duly notified to the Bank, is a good defence to the Bank if it pays thereon.

2. *Amount*.—The sum to be paid must be set forth with that degree of precision which will enable the Bank to know with certainty what it is. It must be in terms of the national money of account, and not of foreign money. A check drawn on one of our Banks by a depositor living here, and expressed in sovereigns or in francs, would properly be refused payment (1). But familiar and unmistakable abbreviations may be used. Thus in England the marks "£ s. d.," without more, have been held sufficiently to signify pounds, shillings, and pence. (2) In the United States it has been substantially held that the sign "\$" intends "dollars," although the word itself nowhere appears in any other form throughout the instrument. (3) One American case has gone much farther even than this,—it may in fact prove rather dangerously far, when it is considered how easily a dot may slip in where it is not intended, or where a comma, which signifies a very different matter, may have been meant to be placed. An order was drawn simply for "37.89," in figures, without even the mark \$, and the court said that it would intend therefrom that these numbers were used as whole numbers and as decimals to express United States currency. (4) But though a court may have been willing, in a certain case, to prefer this interpretation to the necessity of otherwise holding an instrument

(1) *Rastel v. Draper*, Yelv. 80; *Moore*, 775; *Cro. Jac.* 88; *Grant on Bankers and Banking*, 16, and note.

(2) *Kearney v. King*, 2 Barn. & Ald. 301.

(3) *Corgan v. Frew*, 39 Ill. 31.

(4) *Northrop v. Sanborn*, 22 Vt. 433.

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void for unintelligibility, it hardly follows that a Bank might not be held justified in declining to pay a check so indistinctly expressed on the ground of an uncertainty so great that it could not surely know what its customer's order really was. This might well be adduced as an example of one of those cases, where, even if the court should still hold the instrument sufficient to have drawn payment from the Bank, yet the customer's carelessness must preclude him from recovering damages from the Bank for refusing to pay.

3. *Address*.—It has been held in England, and it is undoubtedly law also in Canada, that a check must be addressed. Ordinarily our Bank checks, in the common forms, bear at the top in large type the name of the Bank on which they are drawn, and usually, either before this name or in the lower left-hand corner, also the words: "To the cashier of," or "To the cashier." Whether or not these words "To the cashier" are indispensable to a perfect check has never been decided; it may be supposed that they are not. No person or institution, not addressed in a check or order, is called upon to cash it, or could be protected in erroneously doing so. A payment so made is simply a gratuitous payment, which the payer can recover from no person (1).

4. *Date*.—A check must be dated. It may be dated either on, before, or after (2) the day it is issued. But it would seem that if a check is not dated at all, and contains no statement of a date when it is to be paid, it is never payable. For a check is payable either on the day of its date, or else on some other day specifically designated in it. So, if it is not dated at all, and if no designation occurs, expressed in the body, which might perhaps operate to supply the deficiency of a formal dating, it is reasonable to say that it can never become due, and payment can never be demanded. If this

(1) Grant on Bankers and Banking, p. 14, and authorities cited.

(2) Wood v. Stephenson, 16 Q. B. (U. C.) 419; Byles on Bills, 17 n (p). Ed 1879.

rule, which is not directly asserted in any adjudication, goes at all too far, it is nevertheless utterly impossible to doubt that a Bank would be fully justified in refusing to pay a check showing an unexplained deficiency of so important a character. It has been said that a check may be dated on Sunday, though it cannot be payable on that day (1).

ANTE-DATED CHECKS. POST-DATED CHECKS.

An ante-dated check is payable immediately. A post-dated check is payable on, or at any time after, the day of date. If it falls due on a Sunday or on a legal holiday, presentment for payment cannot be made until the day following. A Bank is not justified in paying a check which is presented to it before the day on which it purports to have been drawn, or bears date. Such a payment is irregular, and circumstances may easily supervene under which the Bank will be held to pay the amount again, or to restore it to the credit of the drawer, if it has debited him with it, which, however, it has no right to do. For it is unquestionable that in the interval between such irregular payment and the day of the date when the payment could be properly made, the amount ought still to be left standing to the credit of the drawer. The Bank has no right to charge him with the disbursement till the time comes when the disbursement could be properly made on his account. His check is no order till it has matured. So if in the interval he continues to draw checks, the Bank must continue to honour them upon presentment, so long as his account, without decrease by the debit of this item, is sufficient to meet them, until the day of the date arrives. When that day does arrive, the Bank may of course appropriate the sum it has paid out. But if then the intervening drafts have so diminished the depositor's balance that the remainder is not enough to meet the amount of the post-dated check, the deficiency must be the loss of

(1) *Begbie v. Levy* 1 C. & J. 180; *Grant on Bankers and Banking*, p. 14.

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the Bank. (1) Its only source of restitution is from the depositor. Even the right to demand reimbursement from him may be taken away by his revocation in the interval before the maturity. If after the Bank has paid, but before the date of the instrument gave it the right to pay, the drawer countermands his immature order and forbids payment, it is certain that the anticipatory action of the Bank cannot operate to deprive him of this right.

5. *The request to pay.*—Finally, it seems superfluous to remark in closing the list of indispensable requisites, that there must, of course, be sufficient words of ordering or requesting to signify the intent of the drawer that the Bank should pay the sum named in the manner named. This is elementary, and has never required the support of a judicial decision.

Provided the check combines all these characteristics, it is not the less a check, nor is it invalidated as an order on the Bank, because it contains other immaterial matter; such, for example, as the statement that it is given for value received, or a mention of the consideration.

MEMORANDUM CHECKS.

It may be that a check is neither made payable to bearer nor to the order of any person. That is, it may be made payable to the order of A. B., being or intended, and supposed to be, a fictitious name. In such case no indorsement is required, for the check is regarded as equivalent to a check made payable to bearer. (2)

So checks being filled in on printed blanks, and intended also to serve as memoranda of the purpose for which they were drawn, are often made payable to words in themselves meaningless in the connection in which they are used; *e. g.* "to the order of bills payable," or of "rent," or "of 1658,"

(1) Grant on Bankers and Banking, p. 64; *Da Silva v. Fuller*, Chitty on Bills, 180 (10th. Eng. ed.) cited in *Morley v. Culverwell*, 7 M. & W. 178.

(2) *Vere v. Lewis*, 3 T. R., 182; *Minet v. Gibson*, 3 T. R. 481; Judgment affirmed in Parliament, 1 H. Bl. 569; *Collis v. Emett*, 1 H. Bl. 313.

or any other words not signifying either existing persons or a corporation. In all such cases the checks are regarded at law as if they had been made payable simply to bearer, and they have all the legal characteristics of checks actually so made. (1)

ISSUING.

As promissory notes and deeds require delivery to complete their validity as between the immediate parties to them, so also does a check require delivery, or as it is more commonly called "issuing." It is said that a check is "issued" when it is in the hands of any person entitled to demand cash for it. (2) Thus if it be stolen, or if after being lost by the drawer it is found by some other person, it is not in the hands of the thief or of the finder, "issued" as against the drawer, but so far as concerns the Bank it would be considered as issued, and the Bank would be protected in paying it, provided it did so *bona fide* and with no knowledge of the precedent circumstances. In short, checks are commercial paper, and are generally affected by the rules which affect commercial paper. Thus the holder of a check payable to bearer, or indorsed in blank, is presumed to be the owner, *bona fide* and for value. It is only after proof that the original issue of the check was a fraud, or that it was lost by the drawer before issue, that such a holder will be required to show his *bona fides*, to prove that he has given value for the check, and that he has come into possession of it in the usual course of business.

ERRORS IN WRITING CHECKS.

An error or omission occurring in the writing of a check, which is simply clerical, and so obvious that there can be no question in the mind of a reasonable person as to what was

(1) See note (2) *ante*, p. 31.

(2) Grant on Bankers and Banking, p. 14, citing *ex parte* Bignold, 1 Deac. 735; 2 Mont. & A. 633.

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the actual intent of the drawer, may be safely disregarded by the Bank. A payment made upon such a check according to its clearly intended tenor will be protected. Of course in determining what particular defect will be covered by this rule, the officers of the Bank can have no guide beyond their own discretion. If there can be any shade of doubt in their own minds, they are perfectly at liberty to decline to put an interpretation upon the document other than that which its naked phraseology distinctly expresses. It is only where they voluntarily consent to adopt its obvious intent in place of its strict expression, that they will be saved harmless in doing so, if the case shall be judged to be a sufficiently clear and certain one to have authorized their action. A fair example of the species of correction which it would be safe for a Bank to make is furnished by the check which the court had to construe in the case of *Phipps v. Tanner*. (1) There the words "twenty-five, seventeen shillings and three pence" were written, and alone designated the sum for which the order was drawn. The omission of the word "pounds" after "twenty-five" was declared to be so clearly accidental that it might be supplied.

Where the sum written in the body of the check differs from the sum expressed in figures in the corner or margin, the written words, as being the more deliberate act of the drawer are presumably correct and will control the figures. (2)

This rule received a strong illustration in the cited case of *Smith v. Smith*. The marginal figures differed from the sum written in the body, and were altered by the holder so as to make them conform to the written words, but without the knowledge or consent of the drawer. It was sought to have this transaction declared a forgery, as being an alteration of the instrument in a material part. But the court said that the marginal figures in a bill of exchange served only as an index for convenience of reference, and formed no

(1) 5 Carr. & P. 488. See also *Elliott's case*, 2 East. P. C. 951; 1 Leach, 175, S. C.; *Rex v. Port, Bayley*, 12, 6th ed.

(2) *Saunderson v. Piper*, 5 Bing. (New R.) 430; *Smith v. Smith*, 1 R. I. 398.

part of the bill. The bill was not vitiated by an alteration in them which only caused them to conform to the written sum. Nay, where they differ from the body, it is even laid down that evidence is inadmissible to show that the bill was in fact negotiated for their amount, and not for the amount expressed in the written words. (1) No case could well go farther, or be more conclusive of the whole matter than this.

CHECKS AS BILLS OF EXCHANGE.

Mr. Morse, in his work on Banks and Banking, to which we are mainly indebted for our observations on this subject, inclines to the opinion that a check should be treated as an altogether independent and distinct instrument from a bill of exchange, admitting at the same time that in some few specific matters the resemblance between the two instruments is sufficiently strong to cause one and the same rule to cover and include them both. (2) And he is supported in this view by the Supreme Court of the United States. (3)

Mr. Grant, an English authority on the same subject, would appear to be of the contrary mind; and together with the majority of English and American text writers, has expressed in favor of putting checks on the same footing with inland bills as to their general legal incidents and characteristics, admitting, however, that there are points of dissimilarity between the two. (4)

(1) *Saunderson v. Piper*, 5 Bing. (New R.) 430.

(2) Morse on Banks and Banking, p. 259.

(3) *Merchants' Bank v. State Bank*, 10 Wall, 604.

(4) Grant on Bankers and Banking, p. 103 et seq. Byles on Bills, p. 13; *Keene v. Beard*, 8 C. B. n. s. 272; C. C. L. C., arts. 2353, 2354; *Commercial Bank v. Fleming*, Stevens Dig., N. B. Reports, 93; 2 *Revue Critique* 242-3. "All rules relating to checks are derived from usage, sometimes general and sometimes purely local, as it has sprung up for the convenience of business operations. These rules are founded for the most part upon the resemblance which checks have to bills of exchange. They are indeed in almost all respects identical with inland bills of exchange, and are so treated by the writers on English and American law. It is not so in modern France from their not being in the form which the Code de Commerce (article 110) makes sacramental, and not being necessarily drawn in one place and payable in another." C. C. L. C. Reports, III, 220.

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The controversy seems to be little more than one of language. It makes very little difference whether it be stated that a bill of exchange and a check are substantially one and the same instrument, but that they differ, by reason of the usages of business and the manner of drawing them, in some very material points; or whether on the other hand it be stated that they are distinct instruments, but that they have very many and very strong points of resemblance and even of identity. So long as all are agreed on what are in fact the points of difference, this is all that is really essential.

The points of dissimilarity have been declared by Mr. Grant to be, briefly, as follows:—

First. No days of grace are allowed upon checks. (1)

Second. The payee of a check does not obtain any more time by employing a banker to present it; whereas, the holder of a bill, by the same course, would obtain an extra day. (2)

Third. The death of the drawer of a check revokes the drawee's authority to pay; whereas, the death of the drawer of a bill has no effect upon the duties of the other parties to the instrument. (3)

Fourth. A check must be drawn against funds of the drawer in the hands of the drawee; whereas, there need be no funds of the drawer in the hands of the drawee of a bill. (4)

Fifth. The drawer of a bill is discharged by want of due presentment to the drawee; whereas, the drawer of a check is not discharged by any length of delay in presentment, at least unless he can show actual loss or injury to himself by reason of such delay, as, for example, by the failure of the drawee in the interval. (5)

(1) C. C. L. C. Art., 2350, *Moyser v. Whitaker*, 9 Barn. & Cress. 409; *Sutton v. Toomer*, 7 id. 416; *Dowr v. Halling*, 4 id. 330.

(2) *Alexander v. Burchfield*, 7 M. & G. 1060.

(3) *Billing v. Devaux*, 3 M. & G. 571.

(4) *Keene v. Beard*, 8 C. B. n. s., 372, 381.

(5) *Ibid*; C. C. L. C. Art. 2351; and see *post*, "Liability of drawer on delay of presentment." p. 138.

Sixth. Bills of exchange, payable on a fixed day, differ in this respect from a check, which is not due before payment is demanded. (1)

The points of resemblance between checks and bills of exchange noted by Mr. Grant, in the same connection, are as follows:—

First. That notice of non-payment of the check, and non-acceptance of the bill may be dispensed with, if the drawer had no funds or no sufficient reason to expect the payment or acceptance. (2)

Second. That checks may be accepted (though unfrequently) and may pass by delivery. (3)

Third. That the holder of a check is affected by the equities and infirmities, in like manner as would be the holder of a bill. (4)

It has been held under article 2287 of the Civil Code, that in Lower Canada, a person receiving by indorsement a bill of exchange after it is due holds it subject to all the objections to which it was liable in the hands of the indorser; and that this article differs from the law of England, which makes the indorsee liable to the equities attaching to the note itself, (5) that is, to the equities arising out of the transaction in the course of which the note was made—but not to a set-off arising out of a collateral matter. (6)

DUTY OF THE BANK CONFINED TO SIMPLE PAYMENT.

The only act which the Bank is under obligation to perform for the holder of the check is to pay it. It is not

(1) *Boehm v. Sterling*, 7 T. R. 430; *Alexander v. Burchfield*, 7 M. & G. at p. 1067.

(2) *Thomas v. Fenton*, 5 D. & L. 28; *Kemble v. Mills*, 1 M. & G. 757; 9 Dowl. 446; *Carew v. Duckworth*, 4 L. R. Exch. 313; *Robinson v. Hawkesford*, 9 Q. B. 52.

(3) *Keene v. Beard*, 8 C. B. N. S. 372, 380.

(4) *Whistler v. Forster*, 14 C. C. n. s. 248. See C. C. L. C. art. 2287.

(5) See *Sturtevant v. Ford*, 4 M. & G. 101.

(6) *The Amazon Ins. Co. v. The Quebec & Gulf Ports Steamship Co.*, 2 Q. L. R. 310, S. C. 1876.

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required to answer the abstract question whether or not the drawer has funds. It is not obliged to accept or to certify. It is not bound to promise to reserve funds of the drawer to pay it at any future hour or day. Its sole and entire duty is, at the time when actual and immediate payment is demanded, to make such actual and immediate payment. It may voluntarily bind itself by any other undertaking ; but in doing so, it goes beyond what can be legally required of it. For its refusal to do anything, save to pay at once and in full, renders it liable to no action by any person whomsoever. It has been noted as one of the distinguishing differences between a check and a bill of exchange, that the former is presentable, as of right, only for payment, and not for acceptance.

PRESENTMENT FOR PAYMENT.

We have already observed, that checks are in legal effect inland bills of exchange, payable to bearer on demand ; and we shall hereafter see, that an ordinary bill of exchange, payable on demand, must be presented for payment, or, if the parties live at a distance, forwarded for presentment within a reasonable time, which is generally held to comprehend the day after it is issued. Such also is the general rule as to the presentment of checks.

It is the right of the drawer of a check to expect it to be presented for payment at latest within banking hours on the day following the day of its delivery to the payee, if the Bank on which it is drawn be in the same place where the payee lives or does business. (1) If the Bank be not in such place, then the check must, within the same time, be put in due course for presentment, either by being sent by mail to the drawee (2) or by being deposited for collection with a Banker, according to the ordinary custom of such business in that place.

(1) *Rickford v. Ridge*, 2 Camp. 537; *Moule v. Brown*, 4 Bing. N.C. 268; *Bailey v. Bodenham*, 16 C. B., n.s. 288; *Boddington v. Schlencker*, 4 B. & Ad. 752.

(2) *Hare v. Henty*, 10 C. B., n.s. 65; *Bailey v. Bodenham*, 16 Id. 288; *Prideaux v. Cridle*, L. R., 4 Q. B. 455.

But the holder does not gain an extra day for presentment by depositing the check in his Bank for collection. If the payee of the check receive it on Monday and deposit it in his Bank, presentment must still be made in the same place, or the check forwarded to any other place where the drawee Bank is, by the payee's Bank (as by himself) during banking hours on Tuesday. (1)

LIABILITY OF DRAWER ON DELAY OF PRESENTMENT.

But where a check, instead of being presented for payment in due course, is transferred and circulates through several hands, it is conceived that there is a distinction between the time of the presentment necessary as against the original drawer, in the event of the insolvency of the Bank, and the time necessary to charge the person from whom the check was immediately received. The liability of the drawer cannot, it is apprehended, be enlarged by circulating the check, and, therefore in order to charge him, if the Bank fail, the check, in whose hands soever it be, must be presented within the period within which the payee or first holder should have presented it; but as against the party transferring the check to the holder, it is sufficient, whatever be the date of the check, to present it or forward it for presentment on the day next after the transfer.

But though the drawer has the right to expect presentment for payment to be made within the period aforesaid, yet his obligations will be affected by a breach of this duty only under peculiar circumstances. The check which he delivers is only a means whereby he seeks to enable the payee to obtain payment. As a general rule it does not acquit him of his indebtedness, but is only evidence of that indebtedness. It may be held, therefore, for an indefinite period, short of the running of the Statute of Limitations, by the payee or by any subsequent assignee, and if not ultimately paid by the Bank upon presentment and demand

(1) *Alexander v. Burchfield*, 1 Carr. & M. 75; S. C. 7 Man. & Gr. 1061; *Moule v. Brown*, 4 Bing. N.C. 266.

it still remains as evidence of the unsatisfied debt. (1) This rule is subject only to one limitation, viz., that if by the delay in presentment the drawer has suffered any injury, he shall be absolved at least to the extent of such injury (2). The most natural form for such injury to take is where the insolvency of the Bank, intervening between the proper time of the presentment and the actual time of presentment, has caused the dishonor of a check which would otherwise presumably have been duly paid upon demand.

PAYMENT OF CHECKS BY THE BANK.

Strictly speaking, if the Bank has, at the time of presentment of a check for payment, funds to the credit of the drawer sufficient to meet it, unpledged by any acceptance or undertaking of the Bank on his behalf, and upon which no lien for any indebtedness due from him to the Bank has attached, the obligation to pay accrues instantly.

If payment is demanded at noon upon a check which the depositor's unincumbered balance at that hour is sufficient to pay in full, the obligation of the Bank to pay it in full is at once mature and perfect.

It is no matter how many checks may be presented at later hours, or how much the sum of all the checks presented in the course of the day may exceed the amount of the customer's balance. This is no concern of the Bank; not even if it has been informed that such checks have been drawn and will be presented for payment. The rule is "first come, first served." The perfectly simple duty of the Bank is to pay in full each check presented, at the time of presentment, so long as the unincumbered credit of the depositor suffices to enable it to make such payments in full. When this credit will no longer suffice for that purpose, then the Bank must refuse payment altogether. But it has no right to

(1) *Robinson v. Hawkesford*, 9 Q. B. 52; *Mullick v. Radakissen*, 28 Eng. L. & Eq. 94; *Alexander v. Burchfield*, 7 M. & G. 1067; *Serle v. Norton*, 2 Moody & R. 401; *Law v. Rand*, 3 C. B. ; n.s. 442.

(2) C. C. L. C. Art., 2352.

make itself an agent either of the customer or of the holders of his checks, or of both, with the view of securing an equal distribution, *pro rata*, of the deposit of the former among such of the latter as shall make their demand during banking hours in the day. Any such proceeding is totally beyond the range of its powers and functions, and is a clear and unwarrantable usurpation of authority.

The only position of difficulty which can be anticipated as likely to occur for the Bank is presented by the supposition, that a check for an amount exceeding the drawer's balance should be presented and refused for want of funds, and that afterwards a check small enough to be discharged in full from the balance should be presented. The duty of the Bank in such a case has never been judicially determined, yet upon general principles little doubt can be entertained but that the Bank should cash the latter check. The fact of presentment for payment of an attempted overdraft creates no lien of any description upon the balance of the customer.

If the Bank has not funds enough to the credit of the drawer to pay his check in full, it is not obliged to make payment in part. (1) Whether or not it would be justified in doing so may be questioned. There is no authority on the point, nor would Banks often try to exercise such a right. If they can do so, they are obviously bound to indorse the amount of the payment on the check, which would of course still remain in the payee's hands.

A device whereby the check-holder may seek to obtain payment, where his check calls for a larger amount than the drawer's balance at the time of presentment, is that the holder may himself pay in, or cause to be paid in, the amount of the deficiency, and have the same placed to the drawer's credit. The drawer's account being thus made good, the check might perhaps be safely honored by the Bank. But the Bank is not justified in informing the holder what is the

(1) *Murray v. Judah*, 6 Cow. 490.

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amount of the deficiency, or what the state of the drawer's account. He must find it out elsewhere if he can, since the Bank can give such information only at his own peril. (1) If the customer is injured by the disclosure an action will lie against the Bank, (2)

When a note or bill of a customer, discounted by the Bank, falls due, and is unpaid, and the bankers are the legal holders thereof, they are entitled to apply any balance which the customer has to his credit, to the payment of the discounted bill or note; and if such appropriation exhausts the funds which the customer has to his credit, the Bank will not be liable to any action, at the suit of their customer, for afterwards dishonoring his check. (3) Nor will they be liable to such action, if the drawer's assets have been exhausted by the payment of bills, accepted by him, payable at the Bank; and it is not necessary for the Bank to show any special authority, or any further order than that contained in such acceptance, to enable it to pay the amount due upon the bills. (4)

IN WHAT MONEY CHECKS MAY BE PAID.

The legal obligation of the Bank is to pay the customer's checks in such paper or coin, and in such quantities of such paper or coin of any specific denomination, as the law of the land makes legal tender in the case of any ordinary debt. (5) Hence a tender, though of gold coin, if it be the coin of another country is not sufficient. The question of value does not enter into the matter at all, it is a question solely of legal tender. (6) No other species of tender than that authorized by the laws of the land can relieve the Bank from liability to the drawer.

(1) *Foster v. Bank of London*, 3 Fost. F. 214. See Section 25.

(2) *Hardy v. Vesey*, L. R., 3 Exch, 107.

(3) *Jones v. Bank of Montreal*, 29 Q. B. (U. C.) 448.

(4) *Kymer v. Laurie*, 18 L. J. Q. B. 218.

(5) See "Legal Tender," *post* PART II.

(6) *Grant on Bankers and Banking*, pp. 36-38, 40; *Ware's Case*, Rep. Pt. 5, 114, a, Co. Litt. 207. b.

But this obligation of the Bank, at strict law, may of course be waived and dispensed with by the express or implied consent of the holder of the check. He is perfectly at liberty to accept any representatives of value which the Bank may offer to him. If he does so accept, that is to say, if at the time when such representatives are offered to him, he does not object to receive them on the ground that they are not what at law he has a right to demand, then this acceptance operates as a complete waiver of the holder's right to refuse anything save legal tender, and the Bank is discharged by this payment both as towards the drawer and the holder of the check.

Payments are usually offered either in whole or in part of bank-bills or notes, either of the Bank on which the check is drawn, or of other Banks, which circulate as currency in the community. The holder may refuse these, when offered to him, if he wishes; but if he takes them, in the absence of fraud on the part of the Bank he assumes as his own the risk of their value. The waiver was perfected by the very act of acceptance, and cannot be afterward undone. (1) In short, the money or representatives of value, on the moment when they have been paid over the counter and have been fairly received and accepted without objection by the payee, become the property of the payee, for good or for ill. From the moment that the act of transfer is completed, and the minds of the parties have met and agreed upon the things transferred as constituting a payment, instantly the right of either to repudiate or annul, the transaction ceases. If the Bank discovers at once that the drawer's account was overdrawn before the check was paid, it cannot recall the funds from the possession of the holder, not even if he be still at the counter, provided the act of transfer had been perfected by the intent and act of both parties, leaving nothing further to be done. (2)

(1) *Polglass v. Oliver*, 2 C. & J. 15; *Vernon v. Boverie*, 2 Show, 296.

(2) *Chambers v. Miller*, 13 C. B. n. s. 125; 3 F. & F. 202.

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But it is of course essential to the working of this doctrine, that both parties should be acting throughout the transaction in perfect good faith. For if the Bank tender bills or notes which it knows, or which it suspects, or has reason to suspect are either depreciated or worthless, or are likely immediately to become so, and keep this fact a secret from the payee, then the payment is not good (1). And it is a fraud on the part of a holder or payee of a check to present it for payment, provided he knows at the time that the drawer has not to his credit, in the Bank, any funds or not sufficient funds to meet it. Under such circumstances the mistake of the Bank will be revocable at any time after the completion of the transaction; and it may, if need be, recover the amount of the wrong payment in a suit directly against the payee for money had and received (2).

A payment in forged paper, or in counterfeit coin, does not discharge the Bank. For, as has been already seen in the case of deposits paid into the Bank in such material, they do not constitute a payment at all but are simply a nullity (3).

A credit given for the amount of a check by the Bank upon which it is drawn is equivalent to, and will be treated as, a payment of the check. It is the same as if the money had been paid over the counter on the check, and then immediately paid back again to the account, or for the use for which the credit is given (4). This rule has been applied where the Bank held the check for several days, during which the drawer's account was not good, and then, the account becoming good, made the application (5).

So also the certification of the check is, as between the Bank and the drawer, payment of the check (6).

(1) *Spuraway v. Rogers*, 12 Mod. 517.

(2) *Martin v. Morgan, Gow*, 123, 1 B. & B. 289; 3 Moore, 635, S.C. cited to same point in *Bytes on Bills*, 16.

(3) *Ant*, page 116; *Grant on Bankers and Banking*, pp. 38-40; *Camidge v. Alklnby*, 6 Barn. & Cress, 385.

(4) *Odell v. Nat. City Bank*, 45 N. Y. 735.

(5) *Pratt v. Foote*, 9 N. Y. 463.

(6) *Morse on Banks and Banking*, pp. 275, 307 et seq. *Clarke on Bills*, pp. 213-14.

POSSESSION OF PAID CHECKS.

When the Bank has paid the check of a depositor, it is considered to be entitled to possession of it, as a voucher for the payment (1). But this right of possession is not absolute and valid as against all parties. It is rather a right to demand and take the check from the holder, than a strict right to possess the same. It is the custom with most Banks, whenever the depositor sends his book for the monthly balancing, to return to him with it all the checks received and paid up to date. An obligation to do this might perhaps be inferred in most cases from the usage of business and the prior course of dealing between the Bank and the depositor. For it is probable that the habit is almost universal, and it is one which may be properly adduced in evidence (2). But further than this, there is ground for holding that it is also a duty of the Bank at common law to return his paid checks to the depositor. He is considered to have the better right to them, for they are regarded as his evidence of payment of his debt to the payee named in them. The Bank is said to hold them only as his agent (3).

DRAWER'S POWER OF REVOCATION.

A check is simply a written order of a depositor to his Bank to make a certain payment. It is executory, and as such it is of course revocable at any time before the Bank has paid, or committed itself to pay it. But after the Bank has paid or has placed itself under an obligation, or has incurred a liability to comply with the order, the drawer's power to revoke is at an end. Thus after the Bank has, by acceptance of the check, directly undertaken and promised the holder to honour it, the drawer is as much deprived of

(1) *In re Brown*, 2 Story, 512; *Byles on Bills*, p. 21, *Sharswood's note*.

(2) *Regina v. Watts*, 2 Den. (Crown C.) 14 (p. 21.)

(3) *Ib*; *Burton v. Payne*, 2 Car. & P. 540; *Partridge v. Moates*, Ry. & Mood., 153; *Grant on Bankers and Banking*, pp. 77, 75; *Morse on Banks and Banking*, pp. 312 et seq.

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his right to countermand it as if actual payment had been made. The primary duty of the Bank, as the drawer's agent, is to hold or to pay his money as he directs. Primarily it owes no duty to the holder, except under and by virtue of directions from the drawer. Until, by reason of these directions, it has assumed voluntarily, or by action of law has involuntarily come under secondary and superseding obligations to the holder, the latest orders from the drawer govern its right to act on his behalf (1).

The death of the drawer before presentment of the check operates as an absolute revocation of the power of the Bank to pay upon his cheque. At the instant of his death the title to his balance rests in his legal representatives, and his own order is no longer competent to withdraw any part of that which is no longer his own property (2). It has been laid down in the text-books (3), quite generally, that if the payment be made by the Bank in ignorance of the death of the drawer, the Bank will be protected. Doubtless this would be so held. But it must be acknowledged that the cited case of *Tate v. Hilbert*, which the text-books all rely upon as their sole authority for the statement, does not touch upon the point, and furnishes no basis for considering that the rule has the support of so much as a single adjudicated case (4).

ACCEPTANCE OR CERTIFICATION.

The act by which the Bank places itself under obligation to pay to the holder the sum called for by a check must be the expressed promise or undertaking of the Bank signifying its

(1) *Gibson v. Minet*, 2 Bing. 7; 1 Car. & P. 247; R. & M. 68; 9 Moore, 31 Lilly v. Hays, 5 Ad. & El. 548 Walker v. Rostron, 9 M. & W. 411; Malcolm v. Scott, 5 Exch. 603; Weinhold v. Spitka, 3 Camp. 376; (But see *Watson v. Russell* 3 B. & S. 14; 31 L. J. Q. B. (304) *Cohen v. Rule*, 3 Q. B. D. 371 Also to same effect *Grant* p. 91, *Story P. N.*, 498. *Morse*, p. 302, et seq.

(2) *Tate v. Hilbert*, 2 Vesey, Jr., 111. It may be otherwise of a check payable to order, *Rolls v. Pearce*, L. R., 5 Chan. Div. 730.

(3) *Grant on Bankers and Banking*, p. 48, n. *Byles on Bills*, p. 23; *Story on Promissory Notes*, S. 498, Am ed. 1868, p. 695.

(4) *Morse on Banks and Banking*, 278.

intent to assume this obligation, or some act from which the law will imperatively imply such valid promise or undertaking. (1) The most ordinary form which such an act assumes is the acceptance by the Bank of the check, or, as it is perhaps more often called, the certifying of the check. A check is not an instrument which in the ordinary course of business calls for acceptance. The holder is never bound to present it for acceptance apart from payment. (2) Yet there is nothing in the nature of a check which intrinsically precludes its acceptance, in like manner and with like effect as a bill of exchange or draft may be accepted. The holder may present, and the Bank may accept, if it chooses; and it is frequently induced by convenience, by the exigencies of business or the desire to oblige customers, voluntarily to incur the obligation. After it has done so, it is bound as a direct and original promisor to the payee; it and he are parties to a contract upon which he has his right of action directly against the Bank, without any regard whatsoever to its relations with the deposit or the state of the drawer's account, either at the time of or at any time after the acceptance. (3) The acceptance is an undertaking that the check is good then and shall continue good, and this agreement is as binding on the Bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume.

According to the Civil Code of Lower Canada acceptance by the Bank does not discharge the debtor, and the direct action against the Bank, given to the holder, is without prejudice to his claim against the drawer (4), either upon the check, or for the debt on account of which it was received.

(1) See page 100, as to right of holder to sue Bank, without acceptance. Also *Gore Bank v Royal Canadian Bank* 13 Chy. Ont. 425, where it was held that if a Bank refuse to pay a check having sufficient funds of the drawer for the purpose, the holder can compel payment in equity. But the Bank Ledger must show the true state of the drawers account, and not a *nominal* balance to his credit.

(2) and (4) C. C. L. C., Art. 2351.

(3) *Ibid.*; *Keene v. Beard*, 8 C. B., N.S., 372.

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This follows from the express declaration of the law (1), that a check is in legal effect an inland bill of exchange, and subject in general to those rules, which regulate the rights and liabilities of parties to such bills. Non-payment of an accepted check by the accepting Bank furnishes therefore cause of action against the drawer, provided there has been no unreasonable delay in presentment for payment, by which the drawer has suffered injury; and due notice of the dishonour has been given.

According to the highest authorities in the United States, however, the promise of the Bank on the drawer's account, accepted as satisfactory by the creditor discharges the debtor. (2) For, it has been said, the undertaking of the drawer of the bill is that it shall be accepted *and* paid according to its tenor; but the undertaking of the maker of the check is that it shall be paid if duly presented for payment. If the bill be accepted only and not paid, the undertaking of the drawer is not fulfilled, and he is liable accordingly. But, if the holder of the check presents it, and, instead of demanding that payment which alone the drawer authorizes him to do, and which alone the drawer engages shall be made, prefers or consents to accept the certification by the Bank, then the drawer is clearly absolved from further liability.

(1) *Ante* p. 134, *note*.

(2) And at the same time deprives him of all further concern or possible right of action in the premises. That, in short, the acceptance operates to transfer to the holder the drawer's right of action against the Bank. *Commercial Bank of Albany v. Hughes*, 17 Wend. 94; *Bullard v. Randall*, 1 Gray, 605; *Morse on Banks and Banking*, p. 310.

CHAPTER IV.

CHARTER RIGHTS AND PRIVILEGES.

CIRCULATION.

SECT. 1—OF THE POWER TO ISSUE NOTES.

The function of Banks which is of the greatest public importance is that of issuing notes or bills designed to circulate in the community as current money.

The instruments thus issued for circulation are technically and more accurately designated as bank notes, and are ordinarily so called in England. The name bank-bill has, however, come to have the like significance, and in Canada and the United States is more frequently used in ordinary parlance. The law, even for the purpose of interpretation in criminal cases, recognizes the terms as equivalent and interchangeable. (1)

A bank-note or bill, so far as its language goes, is simply the promissory note of the corporation payable to bearer on demand. It expresses nothing but the corporate engagement to pay a certain sum, an engagement, however, as binding and obligatory on the corporation as if entered into by a private person in his private or natural capacity. (2)

That the payment is to be made on demand and without interest may or may not be stated. The presence of the statement is not indispensable, for it would always be deemed to be implied. But a bank-bill though in form a promissory note is yet so different from it, in the purpose for which it is

(1) Section 44.

(2) Section 43.

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put forth, and the legal rules applicable to promissory notes are so far qualified in consideration of this difference of purpose, that it seems better to regard them as distinct though cognate instruments. The one must be, the other may be, negotiable by mere delivery. But the touchstone, by which we can determine to which class any individual paper belongs, is furnished by the question whether or not it was issued for the purpose of passing current as money for an indefinite period, in the daily transactions among the people. If it was so intended it is a Bank note.

"Bank notes," says Lord Mansfield, "are not goods, nor securities, nor documents for debts, nor are they so esteemed; but are treated as money, as cash, in the ordinary course and transactions of business, by the general consent of mankind which gives them the credit and currency of money to *all* intents and purposes. They are as much money as guineas themselves are, or any other current coin that is used in common payments as money or cash, * * * and are never considered as securities for money but as money itself. On payment of them whenever a receipt is required, the receipts are always given as for money not as for securities or notes." (1)

Bank notes, however, are not money in the strict sense of the term; that is to say they are not legal tender, though they would pass as cash under a bequest. (2) They pass current as if they were money only by virtue of a general understanding or tacit agreement to that effect. (3) They are, however, a good tender, unless specially objected to at the time on the ground that they are not legal money (e), provided,

(1) *Miller v. Race*, 1 Burr, 452. See also *Fleming v. Brooke*, 1 Sch. & Lefr. 318; *Drury v. Smith*, 1 P. Urns 404; *Miller v. Miller*, 3 P. Urns, 356; *Ambler*, 68. "These remarks, however, could only apply in their full significance to Bank of England notes, which by statute take the place of coin, for other bank notes, while in the ordinary transactions of business, take the place of and are treated as cash or money, are nevertheless essentially distinguished from it." *Daniel on Neg. Instr.*, vol. 2.

(2) *Chapman v. Hart*, 1 Ves. Sr. 271.

(3) *Miller v. Race*; *Corbitt v. Bank of Smyrna*, 2 Harring, 235; *Handy v. Dibbin*, 12 Johns, 220; *Wright v. Reed*, 3 T. R., 554.

and it is an essential proviso, that they are current notes passing at their par value in business transactions at the place where they are offered. (1)

But though Bank notes are not a legal tender among the community generally, they are so toward the Bank itself which issued them. (2) For every Bank coming under the provisions of this Act is obliged to receive in payment its own notes at par, at any of its offices, and whether they be made payable there or not. (3) To this general and seemingly absolute rule, however, it is apprehended that there are exceptions, and that if the indebtedness to the Bank should arise upon the debtor's subscription for shares of the capital stock, he would be required to discharge such indebtedness in specie or Dominion notes. (4) And further that if the Bank be insolvent, the debtor can tender the amount of notes held by him, for their full nominal or face value, provided only he has come into possession of them prior to the insolvency. (5)

If a bill of exchange or promissory note made or become payable to bearer be delivered without indorsement, not in payment of a pre-existing debt, but by way of exchange for goods, for other bills or notes, or for money transferred to the party delivering the bill at the same time, such a transaction has been repeatedly held to be a sale of the bill by the party transferring it, and a purchase of the instrument, with all risks, by the transferee. (6) And such seems the general

(1) *Grigby v. Oakes*, 2 B. & P. 526; *Brown v. Saul*, 4 Esp. 267; *Owenson v. Morse*, 7 T. R. 64; *Byles on Bills*, p. 10 and note. *Morse* p. 460 and note.

(2) See *The Trustees of the Bank of Upper Canada v. The Canadian Navigation Coy.*, 16 Chy. (U. C.) 479.

(3) See Section 41.

(4) See *Niagara Bank v. Roosevelt*, 9 Cow. 409; *Bailey v. Bacon*, 26 Miss. 455; *Morse v. Chapman*, 24 Ga. 249; *Commercial Bank of Columbus v. Wall*, 56 Me. 167.

(5) *Thorpe v. Wegefarrth*, 56 Penn. St. 82. Such is undoubtedly the law with respect to set-off, the right given by law to every debtor. *Miller v. Receiver of the Franklin Bank*, 1 Paige, 444; *Bruyn v. Receiver*, 9 Cow. 413, n.; *Haxton v. Bishop*, 3 Wend. 13; *Diven v. Phelps*, 34 Barb. 224; *American Bank v. Wall*, 56 Me. 167.

(6) *Fenn v. Harrison*, 3 T. R. 759; and see *Evans v. Whyte*, 5 Bing. 485; 3 M. & P. 130.

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rule governing the transfer by delivery, not only of ordinary bills of exchange and promissory notes, but also of bank notes. (1) Nor is there any hardship in such a rule, for the remedy against the transferor may always be preserved by indorsement or by special contract. The rule, however, is not without exceptions.

And it is conceived, that as an express contract would make the transferor liable without indorsement, so there are other circumstances from which a jury may infer that the intention, and *implied* contract of the parties was, that the notes were not to be payment, if dishonoured. (2)

If, for example, a man ask another to change a Bank note for him as a favor, and the Bank fail, it is conceived that a jury would be justified in inferring an implied contract to refund the change, if the note were duly presented and dishonoured, and due notice given; (3) and it has been held that if a customer pay to his account with his banker notes of a Bank which has failed, and the banker is guilty of no laches, the loss falls on the customer. (4) In all cases where the receiver of notes seeks to return them he must do so within a reasonable time. (5) Where a deposit of Mechanic's Bank

(1) *Camidge v. Allenby*, 6 B. & C. 373; 9 D. & R. 391; see *Robson v. Oliver*, 10 Q. B. 704; and see *Ward v. Evans*, 2 Ld. Raym. 928; and *Rogers v. Langford*, 1 C. & M. 637. *Litchfield Union v. Greene*, 1 H. & N. 884, 26 L. J.; Exch. 140.

(2) See *Van Wart v. Woolley*, 3 B. & C. 446.

(3) See *Rogers v. Langford*, 1 C. & M. 637; *Turner v. Stones*, 1 D. & L. 122; *Ex parte Isbester* 1 Rose, 23; *Woodland v. Fear*, 7 E. & B. 522.

(4) "It is so perfectly reasonable that a person receiving Bank notes in payment of property, or in exchange for cash, or in deposit to be credited to the payer, should, whether the Bank, whose notes they are, should have failed before such transfer or deposit of them, or after it, have the right to return the notes upon the one who gave them, so long as that is done within a proper time after they have been received, that I have no difficulty whatever in accepting it as the rule and law upon the subject. And so far we determine that when the defendants received the notes in question from the plaintiff (it was by way of deposit) they did not receive them absolutely as cash, but conditionally only, that is, with the right to return on the failure of the bank, so that the return is made within a reasonable time," per *Wilson, C. J.*, in *Conn. v. Merchants Bank*, 30 C.P.R. (U.C.) 387.

(5) See *Rogers v. Langford*, 1 C. & M. 642.

bill's had been made on the forenoon of the 28th May, and the amount was credited to the customer's account, the deposit being in good faith, and news was received in the afternoon that the Bank had stopped payment; it was held that for want of a tender of the notes on the 29th, the defendants made them their own, and the plaintiff was entitled to have the amount replaced to his credit at the Bank. "It may be," said the Chief Justice, "that the defendants, if they had presented the notes for payment to the Mechanic's Bank at Montreal on the 29th or 30th of the month, might have given the plaintiff due notice of dishonor on the 30th or 31st of the month, and that might have been sufficient without tendering the notes back. (1) But no such notice of dishonor was given to the plaintiff. He was told on the 30th the notes were to be charged back to him, but that was not a notice of dishonor." (2)

If a bank note is handed over on account of a previously existing debt, the note is not considered as sold; therefore, if the Bank having stopped payment, it is not paid, and due notice of the dishonor of it is given to the transferor, the transferee may have recourse to his original remedy for the antecedent debt; (3) for the creditor is entitled to cash, and if he takes notes, that is, out of favor to the debtor, and it will be inferred, unless there is evidence to the contrary, that the notes were agreed not to be payment if they turned out to be of no value, without laches in presenting, or other

(1) *Timmins v. Gibbins*, 18 Q. B. 722.

(2) *Conn. v. Merchants Bank*, 30 C. P. R. (U.C.) 385; 16 C. L. J. 31.

(3) *Grant on Bankers and Banking*, pp. 419 et seq.; *Byles on Bills*, pp. 163 et seq.; *Ward v. Evans*, 2 Ld. Raym. 928; *Camidge v. Allenby*, 6 B. & C. 373; *Moore v. Warren*, 1 Stra. 415; *Holmes v. Barry*, 1 Stra. 415. An American writer remarks as follows in this connection:—"Bank notes when passed without indorsement for an antecedent debt are regarded by some authorities as conditional payment only, and if not paid, they hold that the debt revives. Even if this be correct (and we think otherwise), it is because they are not offered as cash, or its representative. But bank notes are presumed to be offered as cash, and are legal tender unless objected to; and for this reason the very opposite presumption, that they were received in absolute payment, would arise." *Daniël on Negotiable Instruments*, vol. 2, p. 585.

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default of the taker. Perhaps this may be a sufficient ground upon which to rest the exception (if it is one) to the rule; be that as it may, the exception seems to stand upon authority.

In all cases, whether the bank-note is taken at the time of the sale or for change, or for an antecedent debt, if the transferee can show fraud, as that the transferor knew the Bank to be in a state of insolvency at the time, the former may recover from the latter. (1)

As has been noticed, when bank-notes are taken at the same time that goods are sold, or a consideration of any sort passes, all in one uninterrupted transaction the transferor of the bank-notes is not considered as guaranteeing the solvency of the Bank which issues them, and the transferee takes them for better and for worse.

But although the transferor does not under these circumstances take the risk of the solvency of the makers of the notes, he does in all cases (except where there is an express agreement to the contrary, or perhaps circumstances from which a jury might infer an intention to the contrary) warrant the genuineness of the instrument, and must in all such cases bear the loss if it turns out to be forged or fictitious. (2)

But, as already stated, the person who receives forged or counterfeit bank-notes is not without a duty on his part. In order to recover the debt for which they were given in payment, or receive genuine notes in their stead, he must use diligence, by giving notice that they are counterfeit, and offering to return them within a reasonable time. And what such reasonable time is must depend upon all the facts and circumstances of each particular case. If the forgery be discovered immediately the transferor should be notified immediately, for he may have recourse against some antecedent

(1) Per Bayley J. in *Camidge v. Allenby*, 6 B. & C. 373; per Bramwell B. in *Lichfield Union v. Greene*, 26 L. J., Exch. 140; 1 H. & N. 884.

(2) *Jones v. Ryde*, 5 Taunt. 487; *Fuller v. Smith, Ryan & M.* 49; *Smith v. Mercer*, 6 Taunt. 76. And so it has been repeatedly held in America. *Byles on Bills*, p. 164, note (q). *Ib.* 6th Am. ed., p. 255. *Grant on Bankers and Banking*, p. 421.

transferor, and lose his opportunity of asserting it by delay. (1)

Bank-notes are negotiable like money, and pass from hand to hand by delivery, possession in itself being sufficient evidence of title. This doctrine was established in the leading case of *Miller v. Race* (2) where a bank-note payable to bearer was stolen from the mail, and on the next day was acquired by the plaintiff for full value, in the usual course of business, and without any notice of the circumstance. The Bank-clerk detained the note when presented for payment; and it was held that the plaintiff could recover it, because such notes were universally treated as cash, and it was necessary for the purposes of commerce that their currency should be established and secured. These views are now universally entertained. (3)

Mere possession being sufficient *prima facie* evidence of *bona fide* ownership for value of a bank-note, the holder may enforce its payment, unless his position as a *bona fide* holder be successfully combated. It will not be a sufficient defence to show that the holder was negligent in inquiring when he received it, and he took it under circumstances which would excite the suspicions of a man of ordinary prudence. (4) In the cases of bills of exchange and promissory notes the same principle prevails; but when it is shown that such a bill or note was lost or stolen, or obtained by fraud or felony, the burden of proof is shifted upon the holder, who must show in answer that he acquired it *bona fide* in the usual course of business and without notice. But in favor of the holder of a bank-note, the law in America goes a step further, and exonerates him from any such burden and he can rest secure in its possession, as the evidence of his right to recover, until

(1) *Pooley v. Brown*, 3 L. J. C. P. 135.

(2) 1 Burr. 452.

(3) "It may be taken as settled that Bank-notes are considered and treated for all business purposes and in common daily transactions of mankind as money or cash," *Wilson, C. J.*, in *Conn. v. Merchants Bank*, 30 C. P. R. (U.C.) 385.

(4) *Raphael v. Bank of England*, 17 C. B. 16; 33 E. L. & Eq. 276; *Solomons v. Bank of Eng.* 13 East, 135; *Lowndes v. Anderson*, 13 East, 130.

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the defendant shows that he was in privity with the fraud, or acquired the note *mala fide*, or with notice.

This distinction between bank-notes and other negotiable instruments is not admitted in England, (1) but in the United States it is upheld by high authority, (2) and seems to be clearly the correct doctrine. Bank-notes pass as cash, and are seldom identified by any peculiar earmarks; and it is next to impossible for a trader to remember where, or when, or from whom, or for what consideration he received any particular bank-notes in his cash drawer, and to require him to do so would be an intolerable burden. The holder is, in fact, regarded as in effect the original promisee of the Bank, and not as taking by assignment only the title of the transferor; and a payment to him by the Bank will discharge the debt, unless it knows, or has reason to know, that he acquired the note by fraud, or with notice of fraud on the part of the transferor, which equally impeaches his title.

WHEN AND WHERE PAYABLE.

Every bank-bill or note is redeemable in specie or Dominion notes (3) immediately upon demand, made in business hours at the banking house of the corporation in the place where by its tenor it is made payable. This place, or where more than one is mentioned, one of these places, must always be the chief seat of business of the bank. (4)

There is no necessity for a separate presentment and demand upon each separate bill. The presentment of a package is perfectly proper. But for the purpose of deter-

(1) *De La Chaumette v. Bank of England*, 9 B. & C. 208, where it was held that the holder of a bank-note which had been stolen must show that he had given value for it. See also *Solomons v. Bank of England*.

(2) *Daniel on Neg. Inst.*, vol. 2, p. 388, and cases there cited.

(3) "The Bank, when making any payment, shall, on the request of the person to whom the payment is to be made, pay the same, or such part thereof not exceeding sixty dollars as such person requests, in Dominion notes for one, two or four dollars each, at the option of the receiver." Section 42.

(4) Section 41, sub-section 2.

mining in what description of coin, and in how many pieces of each respective denomination payment may be legally tendered by the Bank, it has a right to treat each bill as a distinct demand. An artifice, which is often resorted to by Banks, when short of funds, is to delay payment upon the bills presented as much as possible by the exercise of every method of exhausting time which the ingenuity of the officers can invent. The employment of only a single official, the inspection by him with affected accuracy and minuteness of every individual bill presented, the slow counting out by him of the smallest coins in which payment can be legally made, are all familiar devices by which Banks hard pressed not unfrequently seek relief. Such proceedings have been uniformly and resolutely condemned by the courts. The duty and undertaking of the Bank is not alone to redeem its bills, but to redeem them with reasonable dispatch; and intentional dilatoriness is a clear breach of the obligation. What is a reasonable dispatch is a point which is of course incapable of accurate abstract definition. No precise number of officers can be declared to be necessary, and no precise number of minutes or seconds can be arbitrarily allotted as proper for the payment of a certain number of bills. The Bank is entitled to an opportunity to satisfy itself of the genuineness of the bills before it pays them. But unless some peculiar circumstances give rise to unusual suspicions, it is expected to be able to do this with considerable expedition. In each particular case the court will look at all the circumstances, and will infer from them the animus of the Bank. If *mala fide* intent is apparent, the proceedings will be regarded as tantamount to a deliberate refusal in terms on the part of the corporation to redeem its circulation on demand.

As a general rule Banks are entitled to the benefit of the limitation of Bank hours. It is absolutely necessary that they should have some of the afternoon hours free from the interruptions, and even more from the constant changes in their accounts and money matters, unavoidably produced by the transactions of business. But an effort to take advantage

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of Bank hours, which is clearly evasive of a reasonable duty will not be protected. Thus, if a parcel of bills be presented just before the close of Bank hours for redemption, a refusal to redeem simply because the transaction could not be wholly completed before the hour would be unjustifiable; but if it would necessitate the trespassing to a substantial and really inconvenient extent into the afternoon period of office labor, then the refusal would be proper. The criterion of reasonableness will be applied in all such cases, and only within its protection will the rule of Banking hours be recognized and respected (1).

BILLS STOLEN AND PUT IN CIRCULATION.

A bank bill stolen from the Bank and fraudulently put in circulation is good as against the Bank in the hands of any *bona fide* holder for value, provided the bill was completed in its execution as an instrument at the time of the theft. But if it was incomplete in any material respect, and this defect was fraudulently supplied subsequently to the robbery, then its redemption cannot be enforced. (2) The cited case was argued by eminent counsel, and excited unusual interest at the time. The bills sued upon had been completed in every respect with the sole exception of the president's signature. In this condition they were put away in the cashier's desk, a place of very slight security, and were thence stolen; the president's signature was forged, and they were placed in circulation. Of course the Bank had never executed its promise, and so was not technically liable. But the plaintiffs, among other arguments, urged that the Bank should be held liable, on the ground that it had been guilty of gross negligence, in leaving the bills thus exposed when they were in a state so nearly perfect. The court, however, held that no case was made out. The fact that the independent crime of

(1) *Suffolk Bank v. Lincoln Bank*, 3 Mason 1; *People v. State Treas.*, 24 Ill. 433.

(2) *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Gloucester Bank v. Salem Bank*, id. 33.

forgery necessarily intervened between the theft and the issuing, and was indispensable to the possibility of issuing, rendered it impossible to hold the Bank.

PAYMENT OF LOST OR DESTROYED BILLS.

Ordinarily payment upon a Bank bill or note is conditional upon its surrender. Four classes of cases have arisen in which payment has been sought to be enforced without an offer of surrender, viz., where there has been : (1) Destruction of the whole bill ; (2) Loss of the whole bill ; (3) Destruction of a part of the bill ; and (4) Loss of a part of the bill.

1. *Destruction of the whole Bill.*—The least difficulty is encountered in laying down the rule in this case. It cannot be questioned that if the total and absolute destruction of the bills can be shown the last holder or owner of them, he who was entitled to demand payment upon them at the time of the destruction, can recover from the Bank ; not of course upon the instruments themselves, which must be offered for surrender as preliminary to collection upon them, but upon the original promise of the Bank of which they were the documentary evidence. This rule is perfectly established, and the difficulty arising in cases of destruction does not grow out of any doubtfulness concerning it, but of the stringent rules which are applied to the sufficiency of the evidence offered by the Plaintiff. It is obvious that the Bank must always labor under extreme disadvantages in suits of this character, and the Courts have made it their task to surround the Bank with such substantial protection as the nature of the case permits. It is probable that in the great bulk of such cases the Bank would be without any possible means of disproving either the Plaintiff's possession, or the alleged destruction of the bills, even though the entire story were false. Beyond the testimony to these points therefore he is further held to considerable accuracy in the secondary evidence, descriptive of the bills and notes asserted to have been destroyed.

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Proof of destruction of bills and notes is not enough; it must be proof of the destruction of *specific* bills and notes, and this can be accomplished only by means of a description of each one of them. Evidence adduced by the Plaintiff, and naturally uncontroverted by the Bank, that he had lost in a fire a parcel of the circulating bills of the Bank, amounting in all to a certain sum, is insufficient; for it would not serve as an identification of the Bills, nor enable the Bank to protect itself against them should the destruction at any time afterward appear not to have been accomplished. The same impossibility of identifying the bills would render it also impossible to give to the Bank any sufficient bond of indemnity against reappearance. For no particular bills can be described in such a bond.

2.—*Loss of the whole Bill.*—In this case it cannot be doubted that the loser could have no right to demand payment of the original debt from the Bank. It may be properly considered that so long as the bill in a perfect condition, that is to say not materially mutilated, continues to exist, the original debt is inseparable from it. It is only after it has been destroyed, either wholly or to such an extent that it has lost its negotiability, that the right to sue upon the original indebtedness accrues. For bank-notes notoriously pass by delivery. Any person who takes them *bona fide* for value has a claim against the Bank for their amount, which is unaffected by any previous circumstance in the claim of title. This being the case, therefore, it is clear that the Bank may be called upon to pay twice over if it can be held to pay both the loser and a subsequent *bona fide* holder. There is no reason why the Bank should be subjected to a gross and obvious injustice, simply to relieve the loser from a hardship or misfortune.

3 and 4.—*Destruction of a part of the Bill. Loss of a part.*—These two may be considered together, for they both rest upon the same general principle. That principle is that a piece or fraction only of a bank-bill is non-negotiable,

negotiability is an attribute of the bill as a whole. When it has severed into parts, this quality pertains to no one of them. They are not even payable *pro tanto*, according to the ratio of the size of the part to the whole. For the holder of a part is never entitled to a proportionate payment. The indebtedness is indivisible. Some one person is entitled to the whole, and no other person can be entitled to anything less. Any person who takes a piece takes it subject to all the equities which burden it in the hands of the party transferring it. It makes no difference whether or not value has been parted with by the holder in exchange for it. It must be traced back through the series of intermediate holders until it is brought into the hands of the first person who received it in its fractional condition. If he came by it dishonestly, or if he found it and so parted with no value in exchange for it, then this imperfection in his title adheres to it throughout its entire subsequent career, and no recovery can be had upon it. Hence, it is obvious that the Bank can never be held to pay more than once upon one bill. Only the original owner who was entitled to the whole bill could show a good title, and he only could recover. There seems therefore to be no sound reason why any person presenting a fragment of a bill, and proving conclusively his ownership of the whole bill, could the remainder of it be produced, should not be allowed to recover its full amount. For there can be no other true owner of the entire bill, and no one who cannot prove himself such can ever recover. But claims of this description would seem to furnish peculiarly proper opportunity for demanding that indemnity be given to the Bank, and it will be seen on examination of the cases that it is generally expected. (1)

(1) It is generally maintained that the second part is non-negotiable. See remarks of Judge Marcy in *Hinsdale v. Bank of Orange*, 6 Wend. 378. Also *Byles on Bills*, 13 ed. Eng. 383. *Redmayne v. Burton*, 9 Jur. 21; *Smith v. Monday*, 6 Jur. 977; *State Bank v. Aersten*, 3 Scam. 135; *Farmer's Bank v. Reynolds*, 4 Rand. 186. *Commercial Bank v. Benedict*, 18 B. Monr. 307; *Nothern Bank v. Farmer's Bank*, id. 506. *Morse*, p. 476, and cases there cited.

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An effort has sometimes been made by Banks to save themselves altogether from the necessity of ever paying upon any portion less than the whole of a bill, by publishing the statement that they will not hold themselves liable upon severed bills, and by otherwise using such means as are in their power to notify the community generally of this intention. But such attempts are utterly impotent towards effecting the desired immunity. The Bank is simply a party to the contract to which the rightful owner is the other party. Neither can by a simple proclamation of his wishes or intentions, injuriously affect the rights which the law gives to the other under the contract, and as an essential part of it. The sole exception must lie in the express assent of the other party, and his consequent voluntary abandonment of his rights, which would have to be affirmatively shown. So improbable an inference as against the bill holder will never be based solely upon the simple fact of the declarations made by the Bank and published by it in the newspapers. (1)

PRESCRIPTION AS APPLIED TO BANK BILLS.

A bank note is not subject to the running of the statute of limitations, as any other simple indebtedness or promise to pay would be, although the note is not distinguishable in form from such a promise. Its purpose of circulation necessarily involves this result. Every time that it is reissued by the Bank the promise is renewed, and it must usually be impossible in the case of any particular note to say how often it has passed into, and again has been paid out by, the Bank, or when it was last so paid out. But even if in any individual case it could be shown that the last issue was at a time so long past, that the period of the statute has since elapsed; yet another objection, which goes to the root of the matter, still remains behind. For lapse of time, in the case of these instruments, affords no presumption of their having been paid.

(1) *Martin v. Bank of the United States*, 4 Wash. C. C. 254. *United States Bank v. Sell*, 5 Conn. 106.

On the contrary, their existence in other hands than those of the Bank is at least *prima facie* evidence of non-payment, since they are never paid, and generally speaking payment can never be enforced upon them at law, unless they are surrendered to the promisor. Further, as already shown, a new contract and a new cause of action is created by each transfer, so that it might be argued that the statute could begin to run only from the time when the last holder came into possession. (1)

The privilege of issuing Bank notes is confined to incorporated Banks, and none but such corporations can issue notes designed for the purpose of a circulating medium. (2)

According to the Act (3) the amount of notes issued by any Bank, and outstanding at any time must never exceed the amount of its unimpaired paid up capital, and all notes so issued for circulation must be for the sum of five dollars, or a multiple thereof. The government reserves to itself the right to issue notes of all other denominations. (4)

The execution of Bank notes should conform to the provisions of the statute authorizing their issue. They are usually required to be signed by the President and cashier of the Bank, and where this is required no note will be valid unless so signed. Where Bank notes prepared for the official signatures were stolen from the Bank's possession and the signatures forged, it was contended that the negligence of the Bank should render it liable for their payment. But it was held otherwise, because the crime had been committed after the notes had left the Bank. Had they been complete when they were stolen it would have been different. (5) If signed

(1) See "Winding up Act." Sec. 103, *post.* Chap. VII, as to the reservation of dividends in respect to outstanding notes.

(2) Section 83, *ante* p. 52.

(3) Section 40.

(4) See sections 43 and 44 for statutory provisions as to the issuing of notes for circulation. Also section 70, which makes the payment of Bank-notes a first claim on the assets in case of the insolvency of the Bank.

(5) *Salem Bank v. Gloucester Bank*, 17 Mass. 1. Also see *id.*, 33.

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but incomplete at the time of the theft, it is conceived that they would not be binding on the Bank. (1)

The date of bank notes is not evidence of the time they were issued, because they are often held by the Bank for a long time after being prepared for circulation, and the date indicates rather the series to which the notes belong than the actual day of issue. (2)

(1) Daniel on Neg. Inst. vol. II, p. 377.

(2) F. & M. Bank v. White, 2 Sneed, 482.

CHAPTER V.

CHARTER RIGHTS AND PRIVILEGES.

COLLATERAL SECURITIES.

SECT. 1—GENERAL OBSERVATIONS.

SECT. 2—HYPOTHECATION OF REAL PROPERTY.

SECT. 3—HYPOTHECATION OF PERSONAL PROPERTY.

SECT. 4—DOCUMENTS OF TITLE.

SECT. 5—STOCKS, BONDS AND OTHER PUBLIC SECURITIES.

SECT. 1—GENERAL OBSERVATIONS.

A Bank by its charter is created a "body politic and corporate." This is the legislative recognition of its existence as a corporation, and confers all the rights and privileges of a corporation known to the common law (1) not inconsistent with any of the provisions set forth in the incorporating Act, or any general Act in force on that behalf. It also renders the Bank liable to all the obligations of a corporation. The

(1) At common law the rights which a corporation may exercise, besides those specially conferred by its charter, are all those which are necessary to attain the object of its creation; thus it may acquire, alienate and possess property, sue and be sued, contract, incur obligations, and bind others in its favour. For all these objects every corporation has the right to select from its members, officers, whose number and denomination are determined by the instrument of its creation or by its by-laws and regulations. These officers represent the corporation in all acts, contracts or suits, and bind it in all matters which do not exceed the limits of the

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common law, having been called upon to determine the position to which corporations are to be assigned, has formulated certain rules as applicable to them; these rules are well defined, and are outlined with peculiar distinctness. The title of creation may either enlarge or diminish the rights which are thus enjoyed, and these altered privileges will take precedence over those acknowledged by the common law. A Bank, therefore, in its operation and management, is governed by the rules of the common law and of its charter.

It is necessary to confer in distinct terms in the charter or Act of incorporation only those powers which the Bank could not otherwise exercise, or those concerning which there might be some doubt. Various powers have been at different times declared by the courts to be inherent, and to be properly enjoyed by banking corporations simply by virtue of their creation and existence as such, and for the designated end of conducting the banking business. But powers of this nature, being based only upon a legal implication, must be used only in a manner and for purposes strictly consistent with such restrictions, and in furtherance of such duties as are specifically prescribed by law. Thus a Bank, though not directly thereto empowered by its charter, may borrow money. (1) It is a necessary and inherent privilege. But it is limited by the same necessity or intrinsic propriety which gave it birth. The borrowing must be incidental to the legitimate banking business of the corporation. Otherwise as if the loan was obtained for use in speculation, the act would be *ultra vires*.

powers conferred on them. These powers are either determined by law, the by-laws of the corporation, or by the nature of the duties imposed. Under the corporate name, which is given to it at its creation, the corporation is known and designated, sues and is sued, and does all its acts, and exercises all the rights which belong to it. That a banking corporation is in the full enjoyment of these elementary rights goes without saying. To be deprived of them would be to nullify the fact of legal existence, and to render impossible the exercise of any general powers conferred.

(1) Bank of Australia v. Breillat, 6 Moo., Privy Council, 152.

The intention of charters, granted to trading corporations especially, is to confer certain facilities, privileges and exemptions, which may encourage and enable them to prosecute their objects effectually; and though this, no doubt, is generally done more for the sake of the public, who are to be benefited by their operations, than for the sake of the corporation, yet the legislature has in each case to take care that it sets just bounds to the facilities and privileges granted, in order that such corporation may not interfere prejudicially with private individual enterprise, and may not, so far as depends on the solvency of the corporation, endanger the public interest, by engaging in imprudent transactions which may involve it in ruin. Such has been the desire of the legislature, in framing the general prohibitions enumerated in the forty-fifth section of the present act, a section which in a most stringent manner guards against the corporation applying its capital and corporate privileges to speculations, which might interfere injuriously and unfairly with private enterprise, involve it in business of a very precarious and hazardous nature, or enable it to acquire a monopoly to the general prejudice of trade.

A banking corporation can engage in no business transaction, which is not, properly speaking, of a banking nature, and within the scope of the purposes for which the corporation was organized, save as authorized in this act. The powers with which it is invested must be exercised in strict subordination to this purpose, for the prosecution of which alone they were conferred. A transgression, though under color of an act covered by the designated power, will be illegal. When, therefore, it is specifically permitted to conduct a banking business, it has no power to do any other species of business not because it has been stripped in any manner of that power, but because that power has never attached to it.

A Bank may, however, do on isolated and especial occasions, or for certain purposes, what it cannot do generally and for all purposes. It cannot buy and sell merchandise, but it can take merchandise from a debtor, if this is the only

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way to save the amount of the debt : and of course having taken property of any nature for this proper purpose, it may sell it in any manner that will bring the best price. It may acquire and hold as collateral security for any advance, credit or debt, made or incurred by or to the Bank, Dominion, Provincial, British and Foreign public securities, or the stock bonds or debentures of municipal or other corporations, *except Banks*, and may sell them if need be to save the debt. (1) And such security may be taken either at the time of the making, opening or incurring of such advance, credit or debt or on the maturity thereof. So also may it acquire and hold as security for any pre-existing and matured debt any share or shares of the capital stock of the Bank, and when necessary realize upon any such share or shares (2). And it may purchase public securities in order to invest its surplus funds in them. But it cannot "traffic" in them ; it cannot buy them with a view to sell them shortly at an anticipated advanced price. (3) Such would not fall within any department of the general province of banking, which alone the association can carry on, only in the manner, with the powers and for the objects directly set forth or necessarily implied in the law of the corporate existence.

This view, however, although supported by many English and American cases is not that taken by the Ontario courts. (4) In the cited case it was considered that the words "in such trade generally as appertains to the business of banking" covered the purchasing of municipal bonds. Mr. Justice Proudfoot thus summarizes his opinion on the point in consideration. "The conclusion which seems to me deducible from these acts, is that the business of banking consists in dealing in money, the precious metals, and in bonds and

(1) Section 60.

(2) Section 45.

(3) *First Nat. Bank of Charlotteville v. Nat. Exc. Bank of Baltimore*, 39 Md. 600 ; *Weckler v. First Nat. Bank*, 42 Md. 581. See also *Comstock v. Willoughby*, Hill & Den. 271 ; *Talmage v. Pell*, 3 Seld. 328 ; *Leavitt v. Yates*, 4 Edw. Ch. 134 ; *Sackett's Harbor Bank v. Pres. of Lewis County Bank*, 11 Barb. 213 ; *Portland Bank v. Storer*, 7 Mass. 433.

(4) *Jones v. The Imperial Bank*, 23 Gr. 269

negotiable securities ; that this dealing confers the power of tending on them or of purchasing them, which ever the Bank directors may deem most for the advantage of the corporation ; and that whether to buy or lend is a matter of internal management which the directors may determine."

Banking corporations, by virtue of a long established and universal custom, are permitted to receive the amount of interest in advance, by holding it back at the time when they make a loan, handing over the balance only to the borrower. The Bank can thus secure a slight increase in the actual amount of money which it receives in payment for the use of its funds. This is termed "discounting," and is a part of the general business of banking, enjoyed even without specific authority conferred in the incorporating Act.

Ordinarily it is no part of the banking business to hold or deal in real estate, and no general right to do so can be considered to be inherent in a Bank. Certain obvious cases, however, in which it is eminently proper, almost even necessary that a Bank should be able to acquire, to hold and to sell land and interests in land, will suggest themselves at once to every mind. Thus it may often, especially in small towns, be impossible to obtain a building with the suitable appliances for security, unless the corporation can buy land and erect a structure for itself. Again the mortgage or conveyance of real estate to it may often be the only means by which debts owing to it can be secured or discharged. If a Bank should come into possession of land in perfect good faith for either of these purposes, and should hold it or sell it, only in due and *bona fide* prosecution of these objects, it seems unreasonable to imagine that the most rigorous court of justice would, even in the absence of statutory provision, declare the transaction illegal. But the necessity of discussing the question of the absolute legality of such proceedings has been saved by the insertion in the present Act of clauses specifically enabling Banks to acquire, hold and sell real estate for these purposes.

The legislative expression of the power to take and hold real

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estate in fee and in mortgage, as set forth in the forty-seventh and following sections, of course excludes its exercise otherwise than in precise accordance with the statutory provisions. The holding, acquiring or selling to any greater extent, in any other manner or for any other end than is therein set forth, would be unquestionably illegal (1). Thus, if the corporation should purchase a township of land, and take a conveyance of it, in which should be recited that in order to encourage emigration it had resolved to buy a large tract of land, which the corporation was satisfied it would dispose of at such prices as would yield it a considerable profit; or if it should take a mortgage, in which it was recited that A. B. was desirous of obtaining such advances from the Bank as he might require in his business for the following year, and had given it that mortgage as a security for such advances as he might thereafter require, no court of justice would treat such a mortgage or such a conveyance as valid. It would be evident on the very face of it that it was taken in violation of a positive statute, and did not come within any of the exceptions which could render it legal (2).

Any shareholder may interfere to restrain the Bank from doing a wrongful act. It has been contended, however, that a wrongful act once done cannot be questioned, except on proceeding by *sci. fa.*, taken by the Crown, to repeal the Bank's charter; and that the title to any land wrongfully taken would revert to the Crown, the debtor being fully acquitted of any indebtedness. Our Courts, however, seem unanimous in holding that proceedings to set aside a mortgage, as being in contravention of the Banking Act, need not necessarily be by the Crown. (3)

The authority given to Banks to purchase land at mortgage sales, etc. does not limit the Bank to the purchase of land of only that exact amount and value which will suffice

(1) Bank of Toronto v. Perkins, 8 S. C. Rep. (D) 603.

(2) Per the Chief Justice in McDonald v. Bank of U. C. 7 Q.B. (U. C.)

(3) Grant v. La Banque Nationale, 9 Ont. R. 411; Commercial Bank v. Bank of Upper Canada, 7 Gr. 250, 423.

to secure the debt. (1) It is only necessary that the real and *bona fide* object of the purchase shall be the securing of debts due to the Bank; and provided this be the case, a purchase of land exceeding in value the amount of the debt is perfectly lawful.

The right to commute debts for land is of course general, and is not limited to cases where any doubt exists as to the perfect safety of the debt.

SECT 2.—HYPOTHECATION OF REAL PROPERTY.

It is provided by section forty-eight that a debt contracted to the Bank in the course of its business may be secured by the hypothecation of real property. It has been repeatedly held in the United States that a debt to be thus validly secured must have had existence prior to the taking of the mortgage, and that where the advance and the security are contemporaneous acts, the transaction is null and void, and injunction will issue to prevent foreclosure by the Bank.

The only Canadian case reported, in which this point seems to have been directly in issue, came up before the courts in Ontario, and it was there held that not only may Banks take a mortgage upon real estate as collateral security for sums advanced *bona fide* in the way of their business, but also that such debts need not have been contracted previously, but that the advance and the security may be contemporaneous acts. (2) And this was affirmed in Appeal. (3) It would be a question of fact for a jury to determine whether the mortgage was in truth taken to secure the transaction, or the bill or note discounted, or the debt created for the mere purpose of upholding and giving colour to the mortgage. The following is the reasoning of the court in rendering this decision, a decision which must be considered a leading one upon this point.

(1) Section 49.

(2) *Commercial Bank v. Bank of Upper Canada*, 7 Chy. 250.

(3) *Ib.* 423.

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"The case turns upon the proper construction of the 19th section of the act passed in the 6th year of Her Majesty, to amend the charter of the Bank of Upper Canada. That section, so far as it is material to our present purpose, provides that the said corporation shall not, "either directly or indirectly, lend money, or make advances upon the security, mortgage or hypothecation of any lands or tenements; * * * * * provided always that the said corporation may take and hold mortgages or *hypothèques* on real estate and property in this province, by way of additional security, for debts contracted to the corporation in the course of their dealings." Now the first clause distinctly prohibits the Bank of Upper Canada from advancing money upon the security of land, and I agree in the opinion expressed by his Lordship the Chief Justice, in *McDonald v. the Bank of Upper Canada* (1), that a mortgage executed in violation of that express prohibition would be, unless helped by the proviso, void. That proposition is not, I believe, denied. The contest is as to the effect of the proviso. The plaintiffs contend that where the advance of money, and the execution of a security upon land for the sum so advanced, are contemporaneous acts, the case falls clearly within the prohibition, and is not helped by the proviso; and the argument in favour of that construction is undoubtedly of great weight; for, if the advance of the money and the execution of the security may be contemporaneous acts, it must be admitted that almost every case may be brought, by a little management, within the exception. But on the other hand, if the language of the proviso be clear, we have no authority to depart from its plain meaning for the purpose of creating a more effectual check than the legislature has seen fit to impose.

"Now, upon the best consideration I have been able to give to the subject, I am of opinion that the construction for which the plaintiffs contend is not warranted by the language of the statute. The legislature have not provided that this

(1) 7 Q. B. (U.C.), 252.



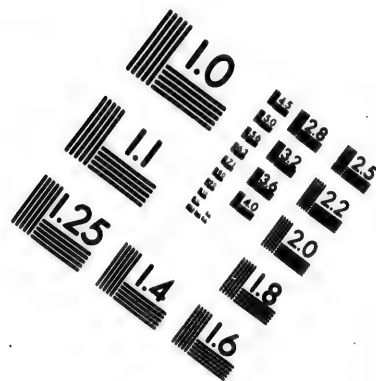
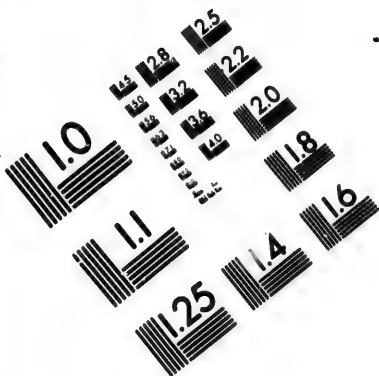
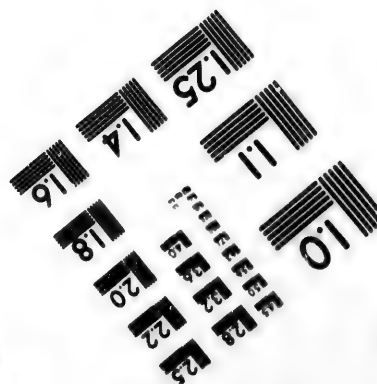
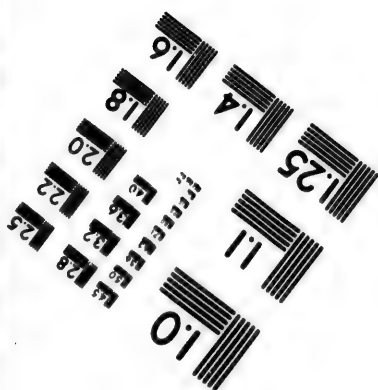
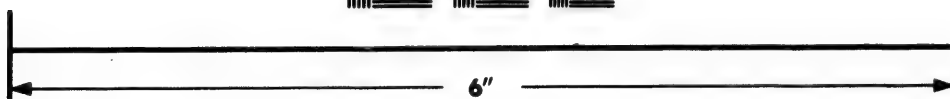
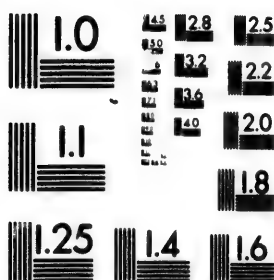


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Bank may take mortgages for debts contracted at some previous time. Had that been so, it is probable that the conclusion for which the plaintiffs contend would have been correct. (1) But that is not the language of the Act. The *proviso* is, that the corporation may take mortgages upon land, by way of additional security, for debts contracted to the corporation in the course of their dealings. The question, therefore, is not whether the creation of the debt and the execution of the mortgage were contemporaneous acts, but whether the debt was created upon a legitimate transaction, and the mortgage taken as additional security. Where that is the case, where there is a *bona fide* contract to advance money upon a legitimate transaction, and that is accompanied by an agreement for a mortgage on land, by way of additional security, the *proviso* applies, and the mortgage is valid. On the other hand, when the money is really advanced upon the land, and the other parts of the transaction are colourable, the mortgage is void.

"I cannot deny that upon this construction the statute is open to great abuse, and that when an attempt is made to defeat it, there must be considerable difficulty in determining whether the money was advanced upon the land, or the mortgage taken as additional security. But that difficulty is not sufficient, in my opinion, to justify an alteration of the plain meaning of the Act. The recent decisions upon the acts for the amendment of the usury laws in England appear to me to furnish an analogy for our guidance in the present case. By the 3 & 4 Wm. IV., ch. 98, bills of exchange and promissory notes, payable at or within three months, were exempted from the operation of the usury laws, but all other contracts remained subject to the provisions of the statute of Anne, and were of course void when more than legal interest was reserved. A question soon arose, as might have been expected, whether the discount of a bill accompanied by a deposit of title deeds, or other real security, was within the statute,

(1) But see *Baird v. the Bank of Washington*, 11 & Serg. R. 416, and *Silverlake Bank v. North*, 4 Johnson, C. R. 370.

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and it was argued with great force there, as here, that such a construction, if adopted, would have the effect of withdrawing every contract from the operation of the statute of Anne, as it would only be necessary to make the discount of a bill or note part of the transaction to bring every case within the exception in the statute of William. The court decided, however, that the validity of the transaction depended upon the question whether the discount was real or colourable merely, and where the discount was a real transaction, and the mortgage was taken as collateral security, they held that the case was protected by the statute. *Lane v. Horlork* recently decided by the House of Lords, is a remarkable case to that effect.

"Had I been able to satisfy myself on the one hand that the legislature merely meant to prohibit this institution from embarking in land speculation, and that this transaction, which clearly was not of that character, ought, therefore, to be upheld; or, on the other hand, that they meant to prohibit mortgages in every case, except when taken as collateral security for a debt contracted at a previous time,—had I been able to adopt either view, the law would have rested, I must admit, on a more satisfactory basis. But I have not been able to reconcile either construction with the language of the statute."

His Lordship, before applying the view he had taken of the law to the case before the court, concluded his remarks as follows: "I cannot say, however, that the opinion I have formed is entirely satisfactory to my own mind, and as the question is one of great importance to the Banking institutions of this province, I hope that it may be brought before a higher tribunal."

Immediately upon the rendering of this decision, proceedings were taken to have the case heard before the Court of Appeal, and in February of the following year (1860) judgment was there rendered, affirming the decision of the court below, and holding further that all chartered Banks have the same power.

The judgment of the Court of Appeal was delivered by Sir J. B. Robinson, Bart., C. J., who thus dealt with the main point at issue.

"When it is shewn that the mortgage in any case was taken by a Bank, 'as an additional security for a debt contracted to it in the course of its business' then the question occurs whether that can only be taken to mean a debt that has been *previously* incurred with it in the course of its business, or whether a mortgage may not be taken as an additional security for a debt that had no previous existence, but which the Bank was about to allow a party to contract, by advancing him money at that time in the proper course of their business; as, for instance, if any merchant had brought to the Bank on the 21st of May, 1855, for discount, a bill drawn by Henry Bull, Jr., on Bull Brothers, and accepted by the latter, could the Bank properly have taken a mortgage from either party to the bill, or from the person who brought it and got the money, to secure them in the money which they advanced upon the bill? That is not this case, and I shall only therefore say that, as the words of the statute are not against it, so I think it might perhaps be held that the spirit and intention of the Act are not opposed to it; and that a mortgage so taken might be upheld, when it appears that the mortgage was really and in truth taken to secure the transaction upon the bill, and not that the bill was created for the mere purpose of upholding and giving colour to the mortgage. That would be a question of fact upon which the conclusion that a jury might come to would be in general so uncertain, that I dare say the Banks will not think it prudent to risk their money on a real security in any such case where the nature of the transaction might appear to be at all equivocal,—so long, I mean, as the present statutes continue in force." It is unnecessary to add that no change has been made in the statutes. The section of the present Act is similar in wording to the section commented upon by the Chief Justice. (1)

(1) Section 48.

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In a more recent case (1) this point seems to have been incidentally raised, but not so, in our opinion, as to over-rule the decision in the case just considered. At least one of the Judges, however, ventured the decided opinion that a mortgage given to cover a contemporaneous loan and not a past debt was null and void under the statute. (2)

This case came before the Supreme Court on appeal from a judgment of the Court of Queen's Bench (appeal side), Province of Quebec, affirming a judgment of the Superior Court. The question of the validity of a mortgage taken simultaneously with the advance, but on an utterly unbusinesslike transaction was distinctly raised in the pleadings, and the Chief Justice thus expressed himself on the point involved.

"I agree with Chief Justice Dorion that the transfer made to the appellants of a mortgage to secure an advance made on a promissory note discounted at the same time that the transfer was made, was on the part of the Bank in violation of the Banking Act, which enacts that :

"The Bank shall not, either directly or indirectly lend money or make advances upon the security, mortgage or hypothecation of any lands or tenements."

It will be noted that the learned Judge refrained from any reference to the forty-eighth section, which provides for the taking of such security "for debts contracted to the Bank in the course of its business." From this might be inferred, either that the transaction was so clearly a loan on land, that this proviso could not be invoked ; or that it did not apply because the transaction was a simultaneous advance and security, which even the proviso could not make valid.

Mr. Justice Gwynne, however, in the course of his extended judgment, referred in distinct terms to the proviso, and did not consider the Court called upon to question its full import, the transaction being so clearly not of an ordinary banking

(1) *The Bank of Toronto v Perkins*, 8 S. C. R. 603

(2) Mr. Justice Strong, p. 616.

nature. He, however, cited the remarks of the Chief Justice of Upper Canada in the case last considered (1) and in his conclusions made use of terms adapted from the judgment there given.

Mr. Justice Fournier was also of opinion that the whole transaction was on its face *an advance on land*, pure and simple, and on that ground alone was for dismissing the appeal.

The following is a brief summary of the cited case, and of Mr. Justice Gwynne's interpretation thereof:

The transfer of the mortgage was based upon the following recital in the deed of transfer:

Whereas the said Walter Bonnell stands indebted to the said Bank of Toronto in the sum of twenty-six thousand dollars currency as represented by a certain promissory note signed by the said Walter Bonnell, and payable to his own order and endorsed by him, and dated at Montreal, the 30th day of December, 1875, and payable at twelve months from the date thereof at the Bank of Toronto, and bearing interest at the rate of seven per centum per annum; and whereas the said Walter Bonnell desires to furnish the said Bank with collateral security for the due and faithful repayment of his said indebtedness.

The deed then assigned among other things:

The sum of \$15,000 currency being the amount of a certain mortgage granted by Samuel S. Campbell to the said Walter Bonnell, passed before the said undersigned notary, and bearing even date herewith, and hypothecating lot No. 446 on the official plan of the St. Antoine ward, of the said city of Montreal.

No such debt as that here recited did, in truth, then exist; no such note as that here recited had then been discounted by the Bank or constituted a debt due from Bonnell to the Bank, but upon the same day as the execution of the mortgage from Campbell to Bonnell, which was executed under instructions from the Bank manager, and its transfer to the Bank, namely, the 19th January, 1876, Bonnell addressed a letter to the Bank manager enclosing to him the note for \$26,000, which letter was as follows:

(1) See *ante* page 174.

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Montreal, January 19th, 1876.

To the Manager, Bank of Toronto, Montreal:

I hereby hand you my promissory note for twenty-six thousand dollars, made payable to my own order one year after date with interest at the rate of 7 per cent. per annum, the above note bearing date the 30th December, 1875, the proceeds of which you are hereby authorized to retain as collateral security for any sterling bills of exchange, now or hereafter to be discounted by the bank of Toronto for me made by L. J. Campbell & Co., on Messrs. Hutchins and Macdonald of London, England, or other parties in Great Britain, and bearing my endorsement.

(Signed) *Walter Bonnell.*

Thos. Doucet, witness.

The signature of Mr. Doucet, who was the notary before whom the mortgage and transfer of it was executed, indicated the time when the note was made, and that it was ante-dated for the purpose of upholding the recital in the transfer was apparent. The only drafts which were shown to have then had any existence upon which was Bonnell's name in any character were the following:—A draft dated 19th January, 1876, by Bonnell (not said upon whom) for £1,458 5s. sterling, endorsed L. J. Campbell and Co., payable in 90 days; another of same date by Bonnell upon Hutchins and MacDonald, also at 90 days for £2,000, also endorsed by L. J. Campbell & Co.; also notes drawn by Campbell & Co., and endorsed by Bonnell for \$1,850, \$1,100 and \$3,000 respectively.

It will be observed that none of these drafts or notes came within the description of the drafts which, by the letter of the 19th January, 1876, endorsing the note for \$26,000, were contemplated as drafts collateral to which the proceeds of the note for \$26,000 were, by that letter, authorized to be held and applied. All drafts, such as those referred to in the letter, had, therefore, yet to come into existence. The note, therefore, for \$26,000 had no original as collateral to which it could be held or applied, at the time it was enclosed to the Bank.

A note payable at twelve months to one's own order, and endorsed to the Bank as collateral security for the payment

of drafts and notes at ninety days discounted by the Bank, upon which as drawer, maker or endorser, the Bank had already the security of the maker of the note at twelve months, can, with no propriety, be said to be a banking transaction in the ordinary course of business, nor could the Bank, going through the form in their own books of putting the proceeds of an apparent discount of such note to the credit of the maker of it to be held, however, by the Bank as security for the due payment of the drafts actually discounted as banking paper, be said, with any propriety, to constitute a debt due to the Bank contracted in the due course of banking business and due to the Bank on the 19th January, 1876, when the note was first placed in their hands. Moreover, on the 20th April, 1877, when the Bank manager, who negotiated the whole of this transaction, proved in Bonnell's insolvency for the debts due to the Bank by Bonnell no claim whatever was made as for a debt due to the Bank upon this note for \$26,000.

Upon a consideration of these facts Mr. Justice Gwynne came to the conclusion "that the note was given existence for the sole purpose of upholding and giving colour to the mortgage and its transfer, which latter contained a false recital of a debt due for the purpose of eluding a discovery of the true nature of the transaction."

From the view we have taken of this case we are forced to consider the decision in the *Commercial Bank v. The Bank of Upper Canada* (as cited on page 170) the law on this point. It must be stated, however, that since the rendering of the decision in the *Bank of Toronto v. Perkins*, it seems to be the opinion of Bank solicitors in general, that a simultaneous advance and hypothecation is illegal, or of such doubtful legality as to render a loan so secured precarious.

It is to be regretted that the legislature has not removed all doubts by a more explicit rendering of its intent. Having seen fit to enact that warehouse receipts and bills of lading are to be taken as security for simultaneous advances *only*; and that stock, bonds and securities *may* be taken for such

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advances, it is clearly a grave omission on its part not to have enacted that only such debts as have been *previously* contracted may be secured by the hypothecation of real property (1)

It certainly is in the interest of Banks to have their position clearly defined, either by distinctly forbidding the simultaneous acceptance of hypothecs on real estate, or by conferring upon them the unconditional right to take such hypothecs as additional security for loans on current discounts, leaving to the discretion of the Banks to guard against the locking up of their funds in such a way as to deprive them of the benefits arising from their circulation and deposits, which would result from simple loans on real estate. This important question will no doubt be fully discussed before the Banking Committee on the renewal of the Bank charters in 1890.

As has been stated, a mortgage can be taken as security, for a debt previously contracted, and also, as it seems, for a debt simultaneously contracted. But a mortgage taken for debts to be thereafter contracted is illegal and void, and injunction will issue to prevent foreclosure by the Bank. In a suit to realize upon a mortgage created in favour of a bank by the deposit of title deeds, the debtor swore that the deposit had been made to secure certain future advances all of which had been paid off; the officer of the Bank, on the other hand, swore that the security was required by the Bank and given by the debtor to secure all his indebtedness, past as well as future, and a memorandum indorsed at the time of the deposit on the envelope containing the deeds was to the same effect. The Court, in the view that the deposit, if made as alleged by the Bank, was lawful, while if made for the purpose stated by the debtor it would have been illegal, made a decree in favour of the Bank with costs. In delivering judgment the court said: "A deposit by way of

(1) It was remarked in a recent case by an Ontario judge that it was not made clear that the word "contracted" meant contracted at the time of the advance being made, and that if the matter in difference rested here his opinion would be in favor of deciding against such meaning. *Grant v. La Banque Nationale*, 9 Ont. R. 423.

security against which the Bank customer might draw would be against the law, and the law upon this point is so well known to bankers that they would hardly be likely to transgress it." (1)

A mortgage may, however, be validly taken as a *continuing* security for the amount due when the mortgage was given, and such mortgage may be worded so as to secure and cover any sum to become due in respect of interest or commission upon the secured notes or renewals, or other commercial paper. (2)

A firm, being desirous of obtaining additional advances from a Bank, executed a mortgage to secure a large sum for which they were liable on the 31st December, 1873, on commercial paper of the firm and its customers which had been discounted by the Bank. The mortgage provided that it should continue a security for the said sum, and all renewals or substitutions therefor. After the mortgage was given the firm's line of discount was increased, but no separate account of the liabilities secured by the mortgage and these further advances was kept, the proceeds of the discounts and cash deposits being carried to the firm's credit in one open current account, against which they drew checks, to retire the notes secured by the mortgage as they matured. The firm became insolvent on the 12th August, 1875, their indebtedness in the meantime never having been reduced. It was held, affirming the judgement of the Vice-Chancellor, that this mode of keeping the accounts had not operated as a discharge of the mortgage debt. (3)

Where in one and the same mortgage, debts previously contracted, and also debts to be thereafter contracted, are alike secured, if the line separating the good from the bad be plain, then the consideration will be divisible, and the

(1) Royal Canadian Bank v. Cummer, 15 Chy. 627. See also Grant v. La Banque Nationale 9 Ont. R. 411 (1885). Commercial Bank v. Bank of Upper Canada, 7 Gr. 250, 423.

(2) Cameron v. Kerr, 3 Ont App. R., 30. (3) Ib.

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mortgage will be void only for so much as is illegal and will be valid for the rest. (1)

It would seem that if a mortgage upon lands be given to a Bank as security for future advances in contravention of the Act, and after the debt has been contracted or advances made, another mortgage be executed upon the same property as additional security for the debts so contracted or advances made, the second mortgage will be valid. (2)

K. & Co. were customers of the plaintiffs, and gradually accumulated a liability of about \$26,000, to secure which the defendants gave a mortgage containing a recital that the plaintiffs had agreed to make further advances to K. & Co. on receiving security for the then present indebtedness, and a redemption clause providing for payment of all bills, notes and paper, upon which K. & Co. were then liable together with all substitutions and alterations thereof and all indebtedness in respect thereof, the same being a continuing security. The Bank did business with K. & Co. in two different ways, one by discounting K. & Co's. customers' notes, in which case their rule was to notify the customers that they held their notes; and another by discounting K. & Co's. own notes and taking their customers' notes as collateral, in which case they always got the collateral notes to an amount exceeding the advance, but did not notify the customers.

At the time the mortgage was given all the notes held by the Bank were believed to be genuine, and the discount of the customers' paper very largely exceeded the discount of K. & Co's. notes. K. & Co. suspended two years later. At the time of the suspension it was discovered that by renewals and substitutions nearly all the notes at the date of the mortgage had been replaced by K. & Co., in renewals and substitutions by forgeries, and that the amount of the discounts of K. & Co's. notes secured by the collateral very

(1) *Kansas Valley Nat. Bank v. Rowell*, 2 Dillon, C.C. 371; *Allen v First Nat. Bank of Xenia*, 23 Ohio St. 97. *Commercial Bank v. Bank of Upper Canada* 7 Gr. 430.

(2) *Grant v. La Banque Nationale* 9 Ont. R. 412.

largely exceeded the discounts of the customers' notes. In an action by the Bank to foreclose the mortgage the mortgagors claimed that they, as sureties, were discharged by the Bank's action.

Held, that the Bank parted with genuine and received fabricated securities, and through its laches or default necessarily worked prejudice upon the rights of the sureties; that of two innocent parties of whom one must suffer on account of the fraud or crime of a third, the one most to blame by enabling the wrong to be committed should bear the loss, and the defendants were exonerated from liability in so far as they were prejudiced by the conduct of the Bank.

Prima facie the Bank were liable to the extent of the face value of the securities surrendered, but they were at liberty to reduce such amount by evidence as they might be advised. (1)

It must be regarded as appurtenant to, or even a part of, the power to take land in mortgage or pledge, that the Bank should also be permitted to acquire and hold an absolute title in and to land so mortgaged. And further to deal in reference to the land or interest therein, in any manner, as, *e.g.* by buying in any outstanding title or interest, or in any other way whatever, that may prove desirable for rendering the security more perfect or more available. And this principle is recognized by the Act. Section fifty confers upon the Bank the power to "purchase and acquire any prior mortgage or charge" that may exist upon any land mortgaged to the Bank as security for a debt due or owing to it.

In selling and conveying real estate, pursuant to the general powers conferred by the Act, a bank may of course lawfully take and hold a mortgage thereon as security for the payment of the purchase money.

A most important amendment to the provisions of the Banking Act is contained in section fifty. It is there provided "that no Bank shall hold any real or immoveable

(1) *Merchants Bank of Canada v. McKay, et al.*, 12 Ont. R. 498.

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property howsoever acquired, except such as shall be required for its own use, for any period exceeding seven years from the date of the acquisition thereof." The object of such an enactment is manifest. The clause is merely a transcript of a clause which is used in bank charters in other countries, and was doubtless adopted by the legislature from those examples. The National Banking Act of the United States limits the period to five years.

Every Bank which violates any provision of this section is liable to a penalty not exceeding five hundred dollars.

SECTION 3.—HYPOTHECATION OF PERSONAL PROPERTY.

At one period of their history Canadian Banks were prohibited from lending money or making advances upon the security, mortgage or hypothecation of personal property, either by way of additional security or otherwise. Of late years, however, their powers have been much increased, and Banks may now take hold and dispose of mortgages and hypothèques upon personal as well as upon real property, by way of additional security for debts contracted to them in the course of their business. And, moreover, the same rights, powers and privileges, held and possessed by them in respect of any real estate which may be mortgaged to them, extend to any personal estate so mortgaged. (1)

It was once said that a provision which would warrant the Bank in taking security on every species of personal property, perishable or otherwise, must inevitably lead to one of the very acts prohibited—namely, that the corporation on taking possession of the personal property mortgaged, and in disposing of it, would directly deal in the selling of goods, or in a trade other than such as generally appertains to the business of banking. The legislature, however, has seen fit to enact

(1) Section 48. See, therefore, *ante* SECT. 2.

such a provision, and it must be considered as an exception to this general prohibition, (1) in the same manner as taking security upon upon real estate is an exception to the one denying to Banks the right to loan money or make advances upon the security of any lands or tenements. And the provision is a wise one. For in the one case as in the other, where a debtor to the Bank becomes of doubtful solvency, it is manifestly expedient to allow the Bank to take security for its debt on any property he may have ; and one can conceive of no good reason why it should not be allowed to do so. By holding it for a limited time it could not incur any risk of involving itself on a hazardous business, or in unforeseen liabilities.

Ships and other vessels are of course included in the term personal property. (2)

Any Bank advancing money in aid of the building of any ship or vessel shall have the same right of acquiring and holding security upon such ship or vessel while building and when completed, either by way of mortgage, hypothec, hypothecation, privilege or lien thereon, or purchase, or transfer thereof, as individuals have in the Province wherein such ship or vessel is being built, and for that purpose may avail itself of all such rights and means of obtaining and enforcing such security, and shall be subject to all such obligations, limitations and conditions as are by the law of such Province conferred or imposed upon individuals making such advances. (3)

It would appear from the above cited section that a Bank may take security for *future* as well as for past advances when made in aid of the building of any ship or vessel. (4) This provision is no doubt intended to promote and encourage the ship-building industries of the Dominion.

The manager of the Branch of an incorporated Bank, to

(1) Mr. Justice Draper in *McDonald et al. v. Bank of Upper Canada* ; 7 Q. B. R. (U. C.) 292.

(2) Vide *McDonald et al v. Bank of Upper Canada*.

(3) Section 52.

(4) *Gormully v. Sinclair, Bank Act. 26.*

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which a chattel mortgage is made for debts due the Bank at that Branch, is an agent authorized to make the affidavit of *bona fides*, under 34 Vict. cap. 17, Manitoba. Under the Ontario Chattel Mortgage Act, a manager would have to be appointed agent for the corporation under its corporate seal. (1)

SECT. 4.—DOCUMENTS OF TITLE.

The may Bank acquire and hold any warehouse receipt or bill of lading as collateral or additional (2) security for the payment of any debt incurred in its favor in the course of its banking business provided the bill or note so secured is negotiated (3) or the debt contracted at the time of the acquisition thereof by the Bank, or upon the promise that such warehouse receipt or bill of lading would be transferred to the Bank. And any bill, note or debt, so secured, may be renewed or the time for payment extended without affecting such security. (4)

The customer of a Bank bought a quantity of wheat for cash, and obtained delivery promising immediate payment. Being remonstrated with by one of the officers of the Bank for having overdrawn his account, and being pressed for immediate settlement, he drew a bill on England, and attached

(1) Ontario Bank *v.* Miner. *Armour's Man. R.* 169.

In this case the mortgagor was indebted to the Bank on account of promissory notes which had been renewed from time to time and partly reduced. The manager refused to renew again and insisted on security, and the mortgagor gave a chattel mortgage under the pressure. The manager swore that he did not know that the mortgagor had other creditors at the time, and the mortgagor swore that he gave the mortgage solely on account of the pressure and to gain time, and not for the purpose of defrauding any creditor. *Held*, that the mortgage was valid.

(2) *Early v. Early*, L. R. 16 Chy. D., 214; *In re Athill* L. R., 16 Chy. D. 222.

(3) "Transferred for valuable consideration," *Foster v. Bowes*, 2 Ont. P. R. 256.

(4) Section 53, sub-sections 2 and 4.

to it the bill of lading for the unpaid wheat. The Bank discounted the bill, and placed it the customer's credit, where it extinguished his indebtedness, he never having had possession or control of the proceeds. The bill was not paid in England and the wheat was sold for the profit of the Bank. Appellant sued the Bank for the proceeds of the sale on the ground that the bill transaction was fraudulent, and was only a covert mode of avoiding the terms of the Banking Act, and obtaining the payment of an *overdue* debt. It was held confirming the judgment of the Superior Court that the transaction was legitimate. (1)

Where the Bank holds warehouse receipts to collaterally secure the payment of notes, and the notes become overdue, and an extension of time is agreed on, the delivery up of the receipts and overdue notes being a surrender of the Bank's lien is a valuable consideration for, and therefore a *negotiation* of the new renewal notes. Moreover it is only a substitution or continuation of securities according to the original understanding of the parties. (2) True, it is not necessary to deliver up the first receipt when a further extension of time is given. But if it should be improvidently or ignorantly handed over to the debtor it is still competent to remedy that error by giving new receipts. (3)

Warehouse receipts or bills of lading so acquired vest in the Bank, from the date of the acquisition thereof, all the right and title of the previous holder or owner, or of the person from whom such goods, wares and merchandise were received or acquired by the Bank, if the warehouse receipt or bill of lading is made directly in favor of the Bank instead of to the previous holder or owner of such goods, wares and merchandise. (4)

At one time the Bank could only acquire a warehouse receipt or bill of lading by endorsement from a previous

(1) *Denholm v. The Merchant's Bank*, M. 22 June 1877 App.

(2) *Bank of Hamilton v. Noye*, 9 O. R., 637.

(3) *Ib.*

(4) Section 53, sub-section 2.

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holder or owner (1) but by an amendment to the Act, enacted in 1880 and embodied in the present Act as above, the warehouse receipt or bill of lading may be given directly in favor of the Bank. (2)

It would seem, however, that a warehouse receipt or bill of lading may not be made out directly, to the Bank if the person desiring to pledge such goods, wares and merchandise is only the agent of the owner; for in such case there must be a previous holder of the receipt or bill *i. e.*, the agent, and there must be a transfer of an existing receipt or bill to the Bank. (3) In such case all the right and title of the owner will be vested in the Bank, subject however to the owner's right to have the same retransferred to him if the debt, as security for which they are held by the Bank, should be paid. (4)

In order to a valid transfer of any warehouse receipt or bill of lading to the Bank a special endorsement is not required, an endorsement *in blank* being quite sufficient. (5) The act does not specify any particular mode in which the property in the receipt is to be transferred, and the notes and receipts attached may be read together.

When taking warehouse receipts, the goods intended to be covered thereby should be described therein with reasonable certainty, and the agent of a Bank should, if possible, see that the goods themselves are in the warehouse and separated from other goods of a similar class. The receipt only covers the actual goods mentioned therein; it does not ordinarily cover substituted goods. (6) In the cited case the receipt covered thirty bales of corks, and the court held that it

(1) *Bank of B. N. A. v. Clarkson*, 19 C. P. (U.C.) 182; *Royal Canadian Bank v. Miller* 28 C. P. (U.C.) 593; 29 Q. B. (U.C.) 266. But see *Molson's Bank v. Janes*, 9 L.C. Jur., 81; *Royal Canadian Bank v. Carruthers*, 29 Q.B. (U.C.) 283.

(2) *Merchants' Bank of Canada v. Smith*, 8 S. C. R. 512; 8 Ont. App. R. 15; 28 Gr. 629. *Dominion Bank v. Davidson*, 12 Ont. App. R. 90.

(3) Section 53, sub-section 3, *Merchants Bank of Canada v. Smith*, 8 Ont. App. R. 15.

(4) *Ib.*

(5) *Bank of Hamilton v. Noye*, 9 Ont. R. 631, (1883).

(6) *Llado v. Morgan*, 23 C. P. (U.C.) 525.

covered the specific bales, and those only in the warehouse at the time of the giving of the same.

Where, however, there is a custom or usage of trade (such as exists in the grain trade) not to deliver back the specific goods, (1) but the same quantity of goods of a similar kind and quantity (or such as exists in the milling business (2), not to deliver back the wheat at all but its equivalent in flour) the operation of the receipt would probably not be restricted.

Where the warehouseman improperly mixes the goods covered by the warehouse receipt, with his own goods, especially where in the warehouse receipt he promises to keep the goods separate; the holder of the receipt as against the warehouseman and as against his assignee in insolvency, or for the benefit of creditors, is entitled to be satisfied out of similar goods in the warehouse to the quantity mentioned in the warehouse receipt. (3)

AGENTS.

An agent may create in certain cases in favor of the Bank a valid pledge on goods belonging to his principal, even though such pledge may be a wrongful and unlawful dealing with the goods, as between the agent and the principal. But he may not give a valid security by way of warehouse receipts on goods in his own possession but belonging to his principal, even although he may be engaged in the calling, as his ostensible business, of keeper of a yard, cove, wharf or harbor, of warehouseman, miller, saw-miller, malster, manufacturer of timber, wharfinger, master of a vessel, or other carrier by land or by water, or by both, curer or packer of meat, tanner, dealer in wool or purchaser of agricultural produce.

According to the Act the expression "agent" means any

(1) *Coffee v. Quebec Bank*, 20 C. P. (U.C.) 111 and 555.

(2) *Wilmot v. Maitland*, 3 Gr. 107; *Mason v. Great Western Ry. Co.* 31 Q.B. (U.C.) 73.

(3) *Merchant's Bank of Canada v. Smith*, 28 Gr. 638-9; *Great Western Ry. Co. v. Hodgson*, 44 Q.B. (U.C.) 196; *Bank of Hamilton v. Noye*, 9 Ont. R. 631.

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person *intrusted with the possession* of goods, wares and merchandise, or to whom the same are consigned, or who *is possessed* of any bill of lading, warehouse, wharfinger's or cove-keeper's receipt or order for the delivery of goods, wares and merchandise, bill of inspection of pot or pearl ashes, or any other document used in the course of business as proof of the possession or control of goods, wares and merchandise, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of such document, to transfer or receive goods, wares and merchandise thereby represented ; and such person shall be deemed the possessor of such goods, wares and merchandise or bill of lading, warehouse, wharfinger's or cove-keeper's receipt or order for the delivery of goods, wares and merchandise, bill of inspection of pot or pearl ashes or other document as aforesaid, as well if the same are held by any person for him or subject to his control as if he is in actual possession thereof. (1)

This is a transcript of the definition as understood under the English Factor's Act and therefore recourse must be had to the law of England, in order to determine more particularly the exact meaning to be given to the word.

It has been held that the term "agent," under the Factors' Acts, does not include a mere servant or caretaker or one who has possession of goods for carriage, safe custody or otherwise, as an independent contracting party, but only "persons whose employment corresponds to that of some known kind of commercial agent, like that class from which the Act has taken it name." (2)

For example if a furnished house be let to one who carries on the business of an auctioneer, he is entrusted as tenant with the furniture, being in fact an auctioneer ; but it never was the common law, and could not be intended to be enacted that, if he carried the furniture to his auction room and there sold it, he could confer any better title on the

(1) Section 53, sub-section 1.

(2) *Heyman v. Flewker*, 13 C. B. N. S. 519.

purchaser, than if he had as auctioneer acted for some other tenant, who committed a similar larcency, as a fraudulent bailee; nor to come nearer to the present case, that a warehouseman or wharfinger, who, as such, is intrusted with the custody of goods, if he happens also to pursue the trade of a factor, can give a better title by the sale of the goods than if they had been intrusted to some other warehouseman who employed him to sell (1)

In the case of *City Bank v. Barrow* (2), a tanner in Montreal received from a merchant in England hides to be tanned; they were tanned and freight was procured for them, but in the meantime the tanner had obtained from the Toronto Bank advances, on his own account on bills, and hypothecated the hides to the bankers, as security for such advances, engaging to hand over to them the bills of lading if his bills of exchange were not duly honored. They were not duly honored, and the bankers (who had acted in entire ignorance of the transaction between the merchant and the tanner) claimed to retain the bills of lading and the hides until their demands were satisfied. The House of Lords, however, decided that the tanner was not a factor or agent, entitled to pledge under any law, Canadian or English, and that the Bank of Toronto acquired no valid lien on the hides, either under the Civil Code, the Consolidated Statutes of Canada, c. 59, or the Bank Act.

Lord Selborne, in the course of his judgment, at page 673, says: "It is manifest that the operation of these Factor's clauses under the Canadian Code (which is the same as Consolidated Statutes of Canada, c. 59, in this respect), is the same as the operation of the Factor's Acts in England in a similar case. They are taken almost entirely from the English Factor's Acts." Again, at page 675, he says: "I do not propose to dwell longer upon the case. The Bankers Act seems to me to carry it no further. It is true it refers to

(1) Per Blackburn J. in *Cole v. North Western Bank*, L. R. 10 C. P. 369. See also *Johnson v. Credit Lyonnais*, L. R. 3 C. P. D. 32.

(2) L. R. 5 App. Cas. 664.

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the Consolidated Statutes and not to the Code ; but the Code is, on this point, only a repetition of the Consolidated Statutes, and is a legislative declaration of the true meaning of those former statutes which are incorporated in it."

Lord Blackburn, in the course of judgment, at page 678, says ; " It is sufficient to say, briefly, that the decision in *Cole vs. the North Western Bank* (from which an extract is given above) comes to this ; that an agent who can pledge or sell must be an agent of that class which, like factors, (taking almost the words of Mr Justice Willes in the case which has already been referred to of *Heyman vs. Flewker*) have a business which, when carried to its legitimate result, would properly end in selling or in receiving payment for goods.

That would be a kind of class ; factors, and agents in the class of factors. If such a person is "entrusted" and "is entrusted in that capacity," then, in the absence of bad faith on the part of the pledgee, the pledge is good."

The meaning of the words "and such person shall be deemed the possessor of goods or documents of title as well if the same were held by any person for him or subject to his control as if he is in actual possession thereof" as used in the concluding part of the definition of agent in section 53, will be found discussed in the case of *Portalis vs. Tetley* (1) where it was held that "a factor by pledging goods in his possession or under his control, as agent, for an amount which did not exhaust their value, had not thereby parted with his control over the goods, so as to preclude himself from making a further pledge for the balance of their value which should be valid as against the principal under the Factor's Acts."

BILLS OF LADING AND WAREHOUSE RECEIPTS.

A bill of lading is a memorandum signed by a master of a ship acknowledging the receipt of a merchant's goods. By the English law it is generally supposed that a bill of lading properly so called is confined to maritime adventures. The

(1) L. R. 5 Eq. 140.

Bank Act, however, extends its meaning so as to cover receipts for goods to be carried by water or land. "The expression bill of lading includes all receipts for goods, wares or merchandise, accompanied by an obligation to transport the same from the place where they were received to some other place, whether by land or water, or partly by land and partly by water, and by any mode of carriage whatever." (1)

The expression "warehouse receipt" means any receipt given by any person, firm or corporation for any goods, wares or merchandise in his or their actual, visible and continued possession as bailee or bailees, in good faith, and not as of his or their own property, and includes receipts from any person who is the keeper of any harbor, cove, pond, wharf, yard, warehouse, shed, storehouse, tannery, mill or other place in Canada, for goods, wares or merchandise in the place or in one or more of the places so kept by him, whether such person is engaged in other business or not, and includes also specifications of timber. (2)

The above definition was first introduced into the Banking Act in 1880. It is generally supposed that it was enacted to meet the difficulties caused by a series of decisions in Ontario, to the effect that under a section corresponding nearly to section 53 of this Act, the warehouse receipt to be valid must be given by a person exercising the business of a warehouseman. (3) Under the law as it at present stands it is supposed that A., a dry-goods merchant, could deliver a bale of silk into the possession of B., another dry goods merchant, to be deposited and kept in B.'s store, B. could then issue a valid warehouse receipt to A. for this bale of silk. (4)

The definition above given of a warehouse receipt is therefore to be read so as to discriminate between two classes of persons who are authorized to issue such receipts.

(1) Section 2, sub-section (c.)

(2) Section 2, sub-section (b).

(3) *The Merchants Bank v. Smith*, 8 S. C. R., 512; *Milloy v. Kerr*, 8 S. C. R.

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(4) *Re Monteith*, 10 Ont. R. 529 (1886).

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1. Any *bona fide* bailee of goods, which are in his actual, visible and continued possession, may give receipts therefor ; and

2. Any person who is the keeper of a warehouse or other place for goods can, in respect of goods being in that warehouse or place, give such receipts. (1)

The same sort of proof is not, it seems, required in the case of a warehouseman granting such documents as in the case of a mere bailee of the goods. It is only in the latter case that it is necessary to the validity of the receipt to prove that he is actually, visibly and continuously in the possession of them from first to last. (2)

Such was the decision in the cited case, Mr. Justice Proudfoot dissenting. (3) From the facts adduced in the case it appeared that M., who was a provision merchant, in his lifetime, had obtained advances from the Banks on the faith of the receipts being valid securities, he representing to them that he had rented the cellar of his warehouse to H. as warehouseman, and that as such H. had sole charge of the cellar. Before the receipts matured M. disappeared and was subsequently found dead. Before his death became known, H. and his solicitor took possession of the cellar and the property covered by the receipts, and posted up in the cellar a notice stating that H. held the property therein as warehouseman of the banks, to whom he had granted receipts. Two days after taking possession, H. refused to be any longer responsible for the property, which was subsequently taken by the Banks under their receipts, and as it was rapidly deteriorating was sold by them. It appeared by the evidence of H. that he had signed the receipts at M.'s request, and as a matter of form, but that he had not leased the

(1) See *Bank of Hamilton v. Noye*, 9 O. R. 631.

(2) *Re Monteith*, *supra*.

(3) *Per Proudfoot, J.*—That the section in question authorizes persons who are not warehousemen alone, but who may have other business, also to give receipts ; but these are comprised in the definition of "warehouse receipt," previously given in the statute, which requires the goods to be in the "actual, visible, and continued possession of the bailees."

cellar, nor had he any control over it or the property contained in it.

Held, that the receipts were good between the parties, and by the result of the subsequent dealings they were rehabilitated so as to be valid against creditors by the act of intervention on H's part during the life of M.

If any person who grants a warehouse receipt or bill of lading is engaged in the calling, as his ostensible business, of keeper of a yard, cove, wharf or harbour, or of warehouseman, miller, saw-miller, maltster, manufacturer of timber, wharfinger, master of a vessel, or other carrier by land or by water or by both, curer or packer of meat, tanner, dealer in wool, or purchaser of agricultural produce, and is at the same time the owner of the goods, wares and merchandise mentioned in such warehouse receipt or bill of lading, every such warehouse receipt or bill of lading, and the right and title of the Bank thereto and to the goods, wares and merchandise mentioned therein, shall be as valid and effectual as if such owner, and the person making such warehouse receipt or bill of lading, were different persons. (1)

The *owner* of goods, therefore, who is engaged in one of the callings herein mentioned as his ostensible business, may give a valid warehouse receipt "on his own goods in his own possession" (2). In the cited case of the *Merchants Bank v. Smith* it was held by the Ontario Court of Appeal that it was necessary, under the Act as it then stood, for a warehouseman, who also owner, to issue a warehouse receipt in his own favour, and then transfer it to the Bank. This though a literal construction of the statute was not that adopted by the Supreme Court, to which the case was further appealed.

At present, as the law stands since the late amendments, there can be no manner of doubt but that a warehouse receipt may be validly issued directly to the Bank by a person engaged in one of the callings specified in the above quoted section, who is also owner of the goods.

(1) Section 54.

(2) *Molson's Bank v. Lanaud*, 5 L. N. 263; *Merchant's Bank v. Smith*, 8 S.C. R. 512.

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Recent legislation (1) has added the word "distiller" to the list of persons who may thus issue warehouse receipts on their own goods in their own possession.

SECT. 4—STOCKS, BONDS AND OTHER PUBLIC SECURITIES.

In like manner as the Bank is prohibited from dealing in or making advances on the security or mortgage of real estate or of goods, wares and merchandise, except as specially authorized, so it is strictly enjoined from buying shares of its own stock, or lending money on the security of them.

The statutory prohibition, forbidding the Bank to loan on the security of its own stock, however, only forbids it to take such shares directly in pledge, and is not intended to affect the general statutory lien, and loans which may be made in reliance thereon. (2)

This prohibition is, moreover, confined to dealings in its own stock or in the stock of other Banks, for it is expressly enacted that nothing in the act is to prevent the Bank from acquiring and holding, as collateral security for any advance made by the Bank, or debt due to the Bank, or for any credit or liability incurred by the Bank to or on behalf of any person (and either at the time of the making of such advance, or the contracting of such debt, or the opening of such credit, or the incurring of such liability), Dominion, provincial, British or foreign public securities, or the stock bonds or debentures of municipal or other corporations, except banks.

All such stock, bonds, debentures or securities may, in case of default to pay the debt for securing which they were so acquired and held, be dealt with, sold and conveyed in like manner, and subject to the same restrictions as are provided in respect of stock of the Bank on which it has acquired, a lien. The right to so deal with and dispose of such stock

(1) May, 1888.

(2) Section 59, *Vansands v. Middlesex Co. Bank*, 26 Conn. 144.

bonds, debentures or securities in manner aforesaid may however be waived or varied by any agreement between the bank and the owner of such stock, bonds, debentures or securities, made at the time at which such debt was incurred, or if the time of payment of such debt has been extended, then by an agreement at the time of such extension. (1)

We have already seen (2) that the Bank may acquire a valid title to bonds or debentures, purchased either as an investment for surplus funds or for purposes of profit. Whether this power would extend to the purchase of stock in chartered corporations has never been adjudicated upon.

(1) Section 60 is misprinted on p. 35, *ante*, and should read as above.

(2) *Ante*, p. 167. See also *post*, 220.

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CHAPTER VI.

OF OFFICIAL BONDS.

SECT. I—GENERAL OBSERVATIONS.

SECT. I—GENERAL OBSERVATIONS.

Before permitting any cashier, officer, clerk or servant of the Bank to enter upon the duties of his office, the directors are required by law to demand a bond or other security for the due and faithful performance of his duties. (1) The question of the enforcement of such securities for loss arising to the Bank through the fraud or folly of a defaulting official will now be our subject of enquiry. Nearly all the questions which have arisen in litigation upon such bonds may be divided into three classes, to wit:—

I. Where it is denied that the particular act, which constituted the default of the officer, was of such a description as to be covered by the language of the bond setting forth the peculiar species of misconduct insured against.

II. Where it is doubted how long the liability of the sureties should be construed to continue, and therefore whether the default fell within the period of their liability.

III. Cases in which fraud or other illegality, charged to have been attendant upon the execution of the bond, are adduced as cause for invalidating it.

PHRASEOLOGY OF THE BOND.

Of course considerable variety is found to exist in the form and language of the bonds used by different corporations,

(1) Section 18, sub section 2.

and especially in those portions wherein is described the species of good and satisfactory conduct which is insured. Very commonly only general phraseology is used. It is stipulated simply that the officer shall "well and faithfully," or "faithfully," or "well and truly," discharge and perform his duties. Practically it may be considered that these phrases are equivalent each to either of the others. For though a finical linguist might seek to draw some delicate distinction between the signification of the word "well" on the one side, and the words "faithfully" and "truly" on the other, yet such over-nicety is not encouraged by the law which has been laid down in the premises; and it is safe to say that these words may be used interchangeably. The better rule of construction, which is to be applied to all alike, seems to be that they are designed not only to guarantee honesty and obedience, but also reasonable skill, competence, and diligence. The reason for taking the bond is by no means limited to the narrow object of protecting the banking-house only against loss arising from embezzlement or other species of criminal conversion and misappropriation, but also against the equally mischievous danger of carelessness, thoughtlessness, and ignorance. (1) The security for the "faithful discharge" of duties would be rendered utterly illusory, if its import were to be narrowed to a guaranty against personal frauds only. Duties performed negligently and unskilfully, or violated from want of capacity or want of care, can never be said to be "well and truly" executed. (2) A bond calling only for "faithful" performance was declared to bind the obligors not only for the honesty of the officer, but also for his "faithful execution of the duties of his office, which embraces competent skill and due diligence." (3)

Alt. : hgh an over-payment by mistake may be set up, and often successfully, in defence to a suit upon a bond, it is necessary that the officer should have acted honestly, not only in

(1) *Rogers v. Kelly*, 2 Camp. 123.

(2) *Minor v. Mechanics' Bank*, 1 Pet. 46.

(3) *American Bank v. Adams*, 12 Pick. 303.

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the transaction of over-payment, but equally in reference to all matters which, however remotely, concern it or are connected with it. If he subsequently commits any deceit or fraud, or makes false entries in the books, for the purpose of concealing the deficiency, his dishonest dealing in this particular will suffice in the eye of the law to give the coloring of guilt to the entire affair from the very outset. It may still remain true that the actual loss of the money was caused wholly and solely by the innocent over-payment; and that the subsequent misconduct could not aggravate the injury, as subsequent good conduct could not have remedied it. Still the acts resorted to for securing concealment are a *suggestio falsi*; the concealment itself is a *suppressio veri*. Each is an unfaithfulness, and will, as a rule, be assumed to have contributed to the injury suffered by the bank. (1)

But a loss of moneys or securities by reason of a theft or robbery, accomplished without the collusion of the officer, and not furthered or rendered possible by his negligence or incompetence, would be a good defence to a suit upon a bond written in any of the forms heretofore described. (2) The bondsmen are certainly not insurers against the acts of any person, save the principal in the bond.

Where the obligee, being a joint-stock banking company, received, after execution of the bond, a considerable accession of proprietors and capital, and thereupon increased the number of directors and changed its name, it was nevertheless held that the bond continued a live security, surviving these changes, on the ground that the bank, not having changed its constitution in any respect, had preserved its identity. (3) This seems to be the true test, in theory, whether the obligee has lost or continued his or its identity. But

(1) *Union Bank v. Clossey*, 11 Johns. 182; *Rochester City Bank v. Elwood*, 21 N. Y. 88.

(2) *Allison v. Farmers Bank*, 6 Rand. 204; *American Bank v. Adams*, 12 Pick. 303; *Planters & Merchants Bank v. Hill*, 1 Stew. 301.

(3) *Metcalf v. Bruin*, 12 East, 400.

usual, the difficulty lies in applying the theory to the facts, and determining the question of continued identity.

EVIDENCE.

In a suit to recover a deficiency in money, or the value of securities which ought to be but are not forthcoming, it is sufficient for the bank in the first instance to allege and prove that they came into the hands and possession of the officer, and have not since been returned or accounted for by him. These facts, laid in declaration and satisfactorily established on the trial, suffice to create a presumption that the missing property has been wasted or misappropriated by the officer. If the deficiency is in the money, or uninvested funds of the bank, it is not necessary for the bank to declare or to prove the receipt, at certain times, of specific sums by the cashier, from individuals named, and to allege these particular sums to have been since lost or converted. Obviously this would be at once a useless and an impossible requirement.

All the sums paid into the bank are usually blended into one aggregate mass, and the waste, loss, or embezzlement in the great majority of cases takes place from this. If at any time an officer should lose or embezzle the whole of any especial sum taken by him at one time from an individual, it would probably be totally impossible for the bank to assure itself of the fact. Consequently it is incumbent upon the bank to allege and prove simply that the officer has received a certain amount as a sum total, and that he has returned or accounted for a less amount, likewise as a sum total. If then the defendants seek to rebut the presumption of his liability for the difference which, unless they do so, becomes conclusive and supports a judgment against them, the burden is shifted upon them to allege and show that the deficiency occurred in some manner such as to relieve them from a liability, under the bond, to make it good. If to this end they intend to rely upon the innocent mistake of the officer, or upon a robbery from him, either of which is a sufficient

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defence,(1) they must set forth the time, place, and other circumstances attendant upon the mistake or theft with such certainty, if possible, as to show that it befell while the officer was acting duly and properly in the discharge of his functions, according to the ordinary rules and customs of the business. It is not sufficient for them to show simply that the explanation is a reasonable or a probable one; they must maintain it affirmatively as a positive fact.(2) But the proof which will be required must be in accordance with the intrinsic nature of the fact itself. It would be seldom, for example, that a paying teller could show, with the certainty of demonstration, especially after the lapse of much time, that he had overpaid certain amounts on certain checks. The question would seem to be eminently fit for the decision of a jury.

If the plaintiffs assert that the officer has received a certain amount which he has never accounted for, it will be proper for the defendants to deny that he has ever received, the amount. This leaves the burden of proving the receipt upon the bank. But if the defendants only answer that the officer has accounted for all that he has ever received, they have the onerous task of proving the correctness of both sides of the account, and of making them balance. They in fact relieve their adversaries of nearly all that work which would otherwise have to be done in establishing a *prima facie* case. Furthermore, if they deny the receipt, they may still plead excuses, if the receipt should be proved, which they could not do if they had adopted the other form of answer.(3)

Entries made by the clerk in the books kept by him in the course of his duties will, after his death, be evidence against the sureties in his bond, of his receipt of the moneys therein entered as received. (4)

(1) Walker v. British Guaranty Association, 18 Q. B. 277.

(2) Allison v. Farmer's Bank, 6 Rand. 204; Minor v. Mechanics' Bank, 1 Pet. 46; American Bank v. Adams, 12 Pick. 303; Morris Canal & Banking Co. v. Van Vorst, 3 Zab. 98.

(3) Exeter Bank v. Rogers, 6 N. H. 142.

(4) Whitnash v. George, 8 B. & C. 556.

DESIGNATION IN THE BOND OF THE DEPARTMENT IN WHICH
THE OFFICER IS TO SERVE.

It is commonly the case that the bond of the officer designates in some manner the department in which he is to serve. It may either state that he has been "appointed the cashier," or may simply describe him as "teller," or may contract that he shall perform "the duties of the office of book-keeper;" or by some other similar form of words may recognize the general nature of the functions which he is intended to fulfil. It is obvious that these functions may be subsequently altered and enlarged by the directors, or that they may be in a measure curtailed and others substituted for them, or that the officer himself may without authority transcend them, and that having so transcended them he may, in a province not his own, unintentionally commit some blunder, and thereby cause a loss to the bank, or may designedly commit a fraud or a theft. In all these cases nice questions arise as to whether the act is covered by the undertaking of the bond.

It is clear that the directors cannot materially increase the risks against which the bondsmen have consented to give their guaranty, without the assent, express or implied, of the bondsmen themselves. It has been frequently declared, however, that assent to moderate and reasonable alterations or extensions, made in the duties of officers, will be assumed by the law. The bondsmen are supposed to know that the powers of the board extend to making such changes as it may see fit in the regulations and conduct of the routine of corporate business. They are supposed to contemplate the probability, or at least the possibility, of such action intervening during the period of their liability, to affect it in some small degree, it may be slightly favorably or it may be slightly unfavorably. Within a reasonable scope they must anticipate and submit to variations thus caused. But manifestly this rule must be restrained within the limits of the practical necessities and common-sense rules of the business.

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Assent to any considerable increase of risk can never be implied. The *character* of the risk can never be materially altered. A book-keeper may have many more books given him to keep than he had at the time of the execution of the bond; a cashier may be deputed to act as teller, "for the office of teller is not higher than that of cashier." Such changes do not work substantial increase in the bondsmen's risk, or an increase which it can be supposed that they would have repudiated or would have considered unlikely to occur, when they entered into the contract of insurance. The book-keeper is a book-keeper still; though he has more labor, it is of the same nature; the cashier only fulfils in person the functions of a subordinate, which are strictly consistent with his own office. But to raise an assistant book-keeper to the office of teller, or to the still higher office of cashier, would assuredly be to vitiate his bond as a security for his good conduct and sufficient skill in his new position. (1) It would be absurd to take for granted that persons willing to guaranty that a man has skill and ability enough to assist in keeping books are therefore willing to guaranty that he has skill and ability enough to be the teller or cashier of a banking corporation; equally absurd to declare it to be an implication of law that, because the same persons will guaranty his honesty in the circumstances of such moderate opportunity and temptation to fraud as he must encounter in the book-keeping, therefore they will, and in fact do, guaranty the same honesty in the face of the vastly increased opportunity and temptation held out by the duties of teller or cashier. (2)

And so it has been held in Canada (3) that a surety by bond for the due performance of the office of a bank agent is not

(1) *Anderson v. Thornton*, 3 Q. B. 271. See also *Grant on Bankers and Banking*, p. 260, and cases cited.

(2) *Minor v. Mechanics' Bank*, 1 Pet. 46; *Rochester Bank v. Elwood*, 21 N. Y. 88.

(3) *Bank of Upper Canada v. Covert*, 5 O. S. 541, 1834.

responsible for losses occurring after the nature of the agency has been changed and the agent appointed a cashier. (1)

Next is the case where the officer deliberately transcends the allotted duties of the office named in his bond for the purpose of committing a fraud ; as, for example, where a book-keeper, having given bond specially to perform the duties of book-keeper, and having, as book-keeper, no occasion and no right to handle the money of the bank, nevertheless, overstepping the ordinary routine of his functions, does touch and abstract money. Though there is a conflict of judicial authority concerning the law in such a conjuncture, yet we think that little hesitation will be felt by any professional man (and certainly none whatsoever by any unprofessional man) in selecting the better principle. In *Allison v. Farmers' Bank*, (2) a Virginian bench held that the sureties on an accountant's bond were not liable for his theft of money from the teller's drawer, since his bond secured only his fidelity in the "office of accountant," and as accountant he was not put in possession of any money of the bank. This ruling seems thoroughly narrow and unsatisfactory ; it was rendered only by a divided court, and has been deliberately overruled in New York in the case above cited, of *Rochester Bank v. Elwood* (3), with the true criticism that its principle, if followed, would substantially cancel all official bonds. In this latter case, also, the bond specifically secured the faithful discharge "of the trust reposed in [the officer] as assistant book-keeper." In this case, also, he embezzled funds which, in the strict performance of his duties, he had no occasion to touch, and then he made false entries in his books to conceal the fact. This last feature in the case gives rise to some remarks in the opinion not perhaps strictly bearing upon the precise point in discussion ; but rather than mutilate, or give in an imperfect shape, the reasoning of the court, we shall

(1) Where the bond was to guarantee the principal "as an employee" he being then cashier, his election as managing director and later as President rendered such bond void. *Exchange Bank v. Gault* 30 L. C. J. 259.

(2) *Rand*. 204.

(3) 21 N.Y. 88.

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condense the whole. The judge said that, construing the instrument by the light of attendant circumstances, he did not think that the bond was limited to insuring mere fidelity in the actual book-keeping. The book-keeper was in such close contact that he could easily abstract money, and more easily than any one else could conceal the abstraction by falsifying his books. These facts must be presumed to have been known to the sureties, when they guaranteed his faithful performance of a trust as an employee in the Bank. It cannot be fairly supposed that they intended to guaranty only that he should keep the books correctly, but rather that he should be honest and faithful in his trust as an employee of the bank. They engaged absolutely for his integrity and fidelity in the discharge of the trust of assistant book-keeper. The bond indicated the department to which he was to be assigned, and guaranteed that he was a trustworthy person to discharge its duties. His "faithful discharge" of the trust implies an engagement that he shall not transcend it to embezzle. If he does transcend it, and uses the opportunities it affords him, for the purpose of stealing, it is not a "faithful discharge." Therefore he is liable for the abstraction *per se*. But especially would he be liable if the false entries were concurrent and simultaneous with, and a part of the guilty *res geste*. A liability which would clearly have accrued had these entries been made to enable a confederate to take the money cannot be evaded by the book-keeper's taking it himself. It is no defence that the false entries were made solely to enable him to escape detection. He used a means furnished by his agency to consummate successfully a fraud. The taking and the entries were one transaction, and it can hardly be contended that the ultimate loss of the bank was in no degree attributable to the false book-keeping and the abuse of trust as book-keeper. The falsification was parcel of the wrongful act, and this is deemed sufficient.

Indeed it seems a reasonable general rule to assert that if the officer has, in any part of the transaction, acted otherwise than in perfect honesty and good faith, excuses cannot be

heard to absolve the defendants. It is impossible to split up the transaction into parts, and to say this part was the only part which actually caused the injury, and this part was honest. Such a system of legal anatomy is simply absurd.

THE PERIOD COVERED BY THE OBLIGATION UNDER THE
BOND.

The bond of an officer remains in force as a continuing obligation only during the period for which he legally holds office under his appointment. His re-appointment at the end of this period and his entry upon a second term of office, though no actual gap intervenes, do not operate to revive or to keep alive his bond. If the office be annual, the bond should be annually renewed.

And such bond will cover deficiencies, only clearly shown to have been made during the pendency of the contract. Facts and proof must show this, not hypothesis and opinion (1)

ALLEGED ILLEGALITY ATTENDANT UPON THE ORIGINAL
UNDERTAKING.

We come now to that class of cases, wherein some illegality in the undertaking itself, or in the circumstances attendant upon its inception, are relied upon to invalidate it. The first question which presents itself is, whether a director can be a surety upon the bond of any officer of his own bank. In some countries this has been forbidden by legislative enactment. But it is not thus forbidden by the Banking Act; and when not forbidden by statute it cannot be said to be absolutely illegal. As a matter of practice it is not of unusual occurrence, although as a general rule Guarantee companies incur the obligations incidental to a bond.

In dealing with the parties who purpose to become sureties upon an officer's bond, the directors are held to perfect good faith. The sureties, unless they are informed to the con-

(1) *La Banque Nationale v. Lesperance*, 4 L. N. 151.

trary, have a right to suppose that their undertaking is in the ordinary course of business, similar in all material respects to other like undertakings, and exposing them to no peculiar and hidden risks. If the directors are aware of secret facts which do in truth materially affect and enhance the danger of the obligation, it is their duty, if they have an opportunity, to state the fact to the bondsmen before the delivery of the instrument. It is not enough that they take no positive pains to conceal the truth, and that they answer honestly such questions as the bondsmen put to them. They are bound to give the information, if they have a proper opportunity for doing so. But they are not bound to state facts which only *may* make the risk greater in the particular case than in some other cases. It is facts which they know actually have made it greater. To illustrate the distinction : If an officer already in their service is re-guarantied they are not bound to state to his sureties, offered upon his new bond, that he is careless, negligent, stupid, or a poor and inaccurate accountant. They are not obliged to state that they themselves have been remiss in examining into the condition of the bank, the amount of its funds on hand, and the correctness of its accounts. Neither need they state the existence of other and prior bonds, even though they may be still in force. But if they know that there is in fact a defalcation existing which will be covered by the terms of the proposed bond they are bound to state it, and their failure to do so is such a breach of good faith on their part as will invalidate the contract. Even where a party offered as bondsman had been a director in the bank itself at the time the defalcation took place, and ought therefore from the nature of his official duty to have been aware of it, it was held that he should show that as matter of fact he did not know it ; that his co-directors had carefully concealed it from him up to and after the time of his executing the bond, and apparently with the very object of leading him to execute a bond which would by its terms cover it. But the practice of any such fraud by the directors does not invali-

date the instrument as a whole ; it simply annuls and avoids the liability of the individual surety towards whom the fraud was practised. The co-sureties, with whom the dealings were strictly in good faith, remain bound (1).

BREACH OF STIPULATION IN BOND.

If the bond stipulates that a certain sum only shall be left in the custody of the clerk, and a larger sum be left, the bond is not thereby voided. The nomination of the sum will be construed, unless clearly otherwise expressed, to be a limitation of the liability of the surety (2).

A case in point, in this connection, was as follows : A person had been book-keeper, and in that position had committed frauds, which had never been detected. He was raised to the position of cashier, and as such furnished a bond, with sureties, for the faithful performance of his duties. He continued, however, to commit frauds of a like general character with those previously committed by him as book-keeper. Held, that in a suit by the bank to recover from the sureties on the bond for the frauds committed during the cashiership, it could not be shown in defence that the frauds committed by him as book-keeper would have been discovered had the officers of the bank not been grossly derelict in the examination of the books of the bank. "The object of the bond is to guarantee to the bank the faithful performance by the cashier of his duties. His duties and obligations are not affected by the negligence of the other officers or agents of the bank, and such negligence does not discharge his sureties." It is also a *quære* whether, if the officers of the bank had had knowledge of the frauds of the principal as book-keeper, and had failed to communicate such knowledge to the sureties on his bond as cashier, these sureties would thereby have been discharged. To decide

(1) *Franklin Bank v. Cooper*, 36 Me. 179 ; 39 id. 542 ; *Franklin Bank v. Stevens*, 39 id. 532 ; *Smith v. Bank of Scotland*, 1 Dow, Parl. R. 294.

(2) *Lindsay v. Lord Downes*, 2 Ir. Eq. 307.

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such a *quære* against the sureties would be a great hardship upon them, not easily capable of justification.

Where at the time the sureties executed a bond for the teller, he had already defrauded the Bank (though he had not as yet been detected or suspected by its officials), the sureties sought to show in defence that this fact was concealed from them at the time the risk was taken, and that if it were unknown to the Bank it was by reason of gross negligence and carelessness. The court said that if the Bank had voluntarily suppressed anything they knew, or were bound to know, it might vitiate their contract with the sureties; but if they were only cleverly defrauded, without the ordinary inspections and precautions usual in business disclosing the fact, they were not to be reproached on that score. They could not give notice of what they did not know themselves (1).

In an Ontario case where at the time of entering into the bond, the defaulting clerk was receiving a certain commission or percentage on the business done, a change to the payment of a fixed salary was considered no defence to an action on the bond, there being no stipulation as to remuneration in the bond (2).

Had there been such a stipulation a change of this nature might have been fatal (3).

Where defendants alleged that in the deed in which they became sureties the plaintiff Bank stipulated to pay the defaulting clerk a salary of £300, without which they would not have entered into the bond, but had since reduced his salary to £225; it was held that in the absence of consent on the part of the sureties such reduction had the effect of terminating and making void the bond (4).

The fact that of two of the sureties, one was a director and

(1) *La Banque Nationale v. Lesperance*, 4 L. N., 150.

(2) *Bank of Toronto v. Wilmot, et al.* 19 Q. B. R. (U.C.) 73.

(3) *North Western Ry Coy v. Winsay* 10 Exch. 77.

(4) *The City Bank v. Brown, et al.* 2 L. C. R. 246.

the other a shareholder of the Bank, and aware of the reduction did not presume consent.

SURETY'S RIGHT TO DEMAND AND NOTICE.

No demand need be made upon a surety prior to bringing suit against him (1). Neither is he entitled to prompt notice of a loss covered by his obligation. The bankers may continue to employ the principal and cloak the fact of the loss so long as they like, saying nothing about it to the surety, and concealing it even from their own employees by a false entry on their books of a loan to the clerk of the amount (2). This law was practically established by the jury, who seem to have thought that there was nothing in the obligor's contract with the bank which put it under any obligation to look after his interests in the way of notifying him of the occurrence of a loss. Nor is the rule devoid of reason, for the surety incurs no risk on the ground of being deprived of the opportunity at once to withdraw and annul his suretyship, and so save himself from further loss; for no new liability can accrue against him if the bank continues to employ the officer after knowledge of his misconduct. And even if this last rule should ever be construed, as is within the bounds of possibility, to apply only to cases where the officer's misconduct has been fraudulent, or otherwise wrongful in its character, and not to apply where his default has been simply the result of incompetence, ignorance, or carelessness; still it is not improbable that, if the sureties wish to secure the right to be notified even of such acts, they must insert express stipulations to that effect in their undertaking with the bank. If they neglect to take such precautions in their own interest, the law may well refuse to interfere to protect them from the results of their own *laches*, except in cases which are tainted with actual wrong-doing.

(1) *Pierce v. Williams*, 23 L.J. Exch. 322; *Grocers' Bank v. Kingman*, 16 Gray, 473.

(2) Grant, p. 259, citing *Peel v. Tatlock*, 1 Bos. & P. 419.

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CHAPTER VII.

FORFEITURE OF CHARTER RIGHTS.

SECTION 1.—FORFEITURE FOR MALFEASANCE.

SECTION 2.—INSOLVENCY.

SECTION 3.—THE WINDING UP ACT.

SECTION 1.—FORFEITURE FOR MALFEASANCE.

Generally it may be said that any violation, wilfully or knowingly committed, of any material direction or provision embodied in the law of the corporate existence ; or any fraudulent or dishonest act ; or the occurrence of anything which shows that for any reason, whether of fault or misfortune, the Bank is incompetent in any respect to perform safely and usefully any of its functions, will furnish sufficient ground for taking away the corporate franchise. The refusal to transmit a statement of the condition of the Bank, required by law to be made to a government official ; excessive loans to directors, though no by-law exists in reference thereto ; the making of a note to the Bank, without consideration and merely colorable, which the Bank receives and uses for the purpose of making its assets appear greater ; all these, in the United States, have worked forfeiture of the corporate franchise.

Matters which are a cause of forfeiture of charter cannot be set up and tried in collateral proceedings. There must be a direct process, instituted by the government, in which the defence, excuse, or explanation of the Bank will be heard, and the distinctive question will be judicially passed upon, free from the complication of any other parties, issues or interests.

An act or omission, in order to furnish ground for proceeding to take away the corporate franchise, must be the act of the corporation itself. Cases might arise in which the act or omission of the shareholders, as a body, could have this effect. Ordinarily, however, the law regards the board of directors as constituting the body corporate for all matters of this description. The fault must accordingly be theirs, either directly or by legal implication. Otherwise it will not be the act of the Bank, and will not be a cause of forfeiture. Thus, if a cashier or teller, although acting within the scope of his allotted functions, commits a breach of the organic law, this fact alone is not sufficient to cause a forfeiture. On the contrary, it will be presumed that he alone and individually, of his own motion, is guilty of the misdoing. But if the contrary be affirmatively shown, and it be actually proved that the directors ordered, or knowingly permitted or ratified, the illegal act, then it remains no longer the act of the individual officer, but becomes the act of the Bank, and as such furnishes ground for the process for disfranchisement. It is only when the act of the subordinate is rendered by the attendant circumstances, in the view of the law, the act of the principal, that is to say of the board of directors, or of the Bank itself, that the principal will be deprived of its corporate existence by reason of it. (1) Upon whom the burden of proof rests, whether with the prosecution to show that the act of the officers was in fact the act of the Bank, or with the Bank to show the contrary, is a point which we have nowhere found discussed or decided. It is not improbable, that in any particular case it might depend somewhat upon the nature and the aspect of the act itself; and according as these presumably pointed to the directorate or only to the officer as the origin of the transaction, the *onus* might be shifted to the one side or the other. If, however, a rule of general application is demanded, the directors or Bank may claim the benefit of the presumption of innocence.

(1) *Clarke v. Metropolitan Bank*, 3 Duer, 241; *State v. Commercial Bank*, 6 Sm. & Mar. 218.

The decision of the Attorney General of Canada, (1) on a petition for a writ of *scire facias*, to annul the charter of the Bank of St. Hyacinthe for certain alleged infractions, goes into the question of forfeiture at some length, and we will consider it *in extenso* :

This case was argued on the 22nd of June (1881), and again, after the filing of all the affidavits and documentary evidence on both sides, on the 2nd Nov; and was treated as an application for a *fiat* for a writ of *scire facias*, to be prosecuted in the name of the Attorney General, but by the petitioner, though the petition did not so run.

The petitioner did not allege that he had suffered any prejudice by reason of the alleged infractions of the charter; he in fact averred that he was petitioning in the interest of the public.

It was pressed upon by petitioner's counsel that the *fiat* of the Attorney General in such a case as this should go as "a matter of right" upon the presentation of an *ex-parte* reasonable case by the petitioner, and that the Bank should not have been allowed to file affidavits in contravention or rebuttal of the petitioner's *prima facie* case. Before entering into the facts, the Atty. General said :— "I desire, as far as may be in my power, to state the principles upon which I think the Attorney General should be governed in dealing with an application of this kind.

"The ordinary applications in England are against *patents* of incorporation, when the Crown, through its courts, can cancel, on sufficient ground, what the Crown has granted; but, here, Parliament has incorporated the Bank, and I find no authority (and have asked counsel on both sides, for a reference to any) of a case where an English court has assumed to annul a charter of incorporation created by an act of parliament.

"Reference is made by petitioner to the Canada Joint Stock Companies' Act, 1877, as establishing that no difference

(1) Mr. Campbell, now Sir Arch. Campbell, Lieut. Governor of Ontario.

exists between charters created by letters patent and charters granted by Parliament, because by the provision of that act, charters granted thereunder invest the company thereby created with the same powers, privileges, etc., "as if it were incorporated by a special act of Parliament, embodying the provisions of this act and of the letters patent."

"That provision, it seems to me, is no more than a delegation by Parliament to the Governor General in Council, in certain cases, of certain of its powers, such powers to be exercised upon compliance by intending corporators with the preliminary conditions laid down for that purpose. But the very fact that the Joint Stock Companies' Act specially excludes banking, from the purposes for which a charter may be granted thereunder, clearly shows that Parliament did not intend to delegate to the Governor General in Council its powers in respect to chartering banks, and establishes a distinction between the case of a bank incorporated by special act of Parliament, and a company incorporated under the provision of a general act. And even as to general patents, the powers therein contained, when they are laid down in enabling acts of Parliament, only come into life by the breath of the Crown, and, therefore, I think, differ essentially from acts of Parliament creating corporations.

"The petitioner refers me to the case of *Derby vs. The Queen* (1), but that was a proceeding against a person who had usurped an office created by act of parliament, and the proceedings did not tend to annul the act but to regulate proceedings and redress a wrong committed under it. The act itself remained untouched, and the corporation created by it was not for a moment in jeopardy. The reference to Blackstone 1, 502 "Corporations" does not seem opposite to the point in question.

"I am aware that my predecessor, Mr. Attorney General McDonald, in the case of "*La Banque Nationale*," which held a charter granted by act of parliament, gave his *fiat*

(1) 12 Clark & Fennelly, 520.

upon an ex-parte application for a writ such as is now applied for; and that in some of the States of the Union it has been held that in this respect there is no distinction between charters granted under the great seal of the State and those granted by the Legislature. It is not a question upon which I need express an opinion. But I think its existence increases the responsibility of the Attorney General before whom an application of this kind, against a charter granted by act of parliament, is made.

"The counsel of the petitioner endeavored to minimize the discretionary power of the Attorney General, as far as was possible, and urged upon me that, if, assuming the statements made in the petition to be true, I was of opinion that an infraction of the charter—one or more—had been committed I was bound "*ex debito justitiæ*," upon *prima facie* evidence furnished by the petitioner's declaration of their truth (under the Statute for suppressing extra judicial oaths), to grant my *fiat* for the writ; but such a doctrine would, in fact, deprive the Attorney General of all discretion, and put it in the power of any malevolent individual, upon an *ex parte* statement to bring an incorporated bank—no matter of what magnitude, or with what delicate and extended interests—before the courts in defence of its charter;—a position which, even if it emerged from the presence of the tribunal, without stain of wrong doing, might be attended with the gravest results to its shareholders, depositors, and other creditors, and be reflected upon the whole community where the corporation was domiciled.

"It is contended that under the provisions of article 997 of the Code of Civil Procedure of Lower Canada, it is my duty as Attorney General to prosecute in this case, in Her Majesty's name, upon security being given to indemnify Government against costs. The article in question is founded on C. S. L. C., cap. 88, sec. 2, and expressly states that in cases of violation by a corporation of its charters, "It is the duty of Her Majesty's Attorney General for Lower Canada to prose-

cute in Her Majesty's name, &c." It was not referred to in argument, but I have myself examined the Statute creating the office which I hold. It is Act 31 Vic., chap. 39, sec. 30, and by it the Attorney General of Canada is charged with the powers and duties which, by the laws of the several provinces, belonged to the office of Attorney General in each province up to the time when the British North America Act, 1867, came into effect, and *which laws, under the provision of the said Act, are to be administered and carried into effect by the Government of the Dominion.*

"The B. N. A. Act, 1867, sec. 91, certainly confers on the Dominion exclusive legislative authority with respect, *inter alia*, to banking, the incorporation of Banks and the issue of paper money, but I can find nothing in it which imposes on the Government of the Dominion the duty of *administering or carrying such laws into effect*; and on me the consequent duty of prosecuting a forfeiture of a Bank charter.

"It is the duty of the Government of the Dominion to administer and carry in effect such laws as those relating to Customs and Inland Revenue and Militia, and so forth; but laws relating to Banks, save as regards duties imposed by the Banking Act on the Executive, or to be inferred from the law, are administered in the Province where the Bank is domiciled. No doubt if a Bank violated the terms of its charter, and if the public interest suffered, the Government of the Dominion could take proceedings to forfeit its charter; but no duty imperatively devolves upon me under the language of the statute creating my office in respect of such a proceeding as the present. In coming before me the petitioner must rely on his rights under the common law; these rights are, I think, correctly laid down in the authority to which I shall hereafter refer.

"I think it would be most unfortunate if the law, as petitioner contends, made it imperative upon the Attorney General, upon a *prima facie ex-parte* statement being made out of such facts as showed a violation of the charter of a Bank, to grant his *fiat* for a writ of *scire facias*.

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" I believe, however, that the law will not be found to be so unreasonable.

" In the first place, the Attorney General in a case of this kind may, and I think should, investigate the alleged fact, allow them to be controverted by counter affidavits and others documentary proof, on the part of the Bank ; and not admit them to be established as the basis of action on his part until their truth shall be made manifest to his satisfaction.

" 2ndly. If so established, it would be incumbent upon him further to consider whether they amounted to such clear and hurtful infraction of the charter of the Bank, as to warrant the machinery of the law being set in motion, at the risk to the probable injury to the important attendant interests before referred to ; and,—

" 3dly. Whether the applicant has suffered any prejudice by reason of the alleged infractions or had any private interest in the question he was endeavoring to raise.

"The rule is thus laid down by Lord Campbell in the Queen against the Eastern Archipelago Company. (1)

" The defendants' counsel rely upon data to be found in " the books, that this *fiat* is matter of right. It is matter " of right to all who are justly entitled to it, but those only " are entitled to it who suffer a prejudice by the letters patent " and the breach of the condition upon which they have been " granted. No mandamus would lie to the Attorney General to grant his *fiat* for a *scire facias*. If he were improperly to withhold it, he might be questioned in Parliament, " and he might be punished for his misconduct. But upon " such a complaint being brought forward against him, if he " could show that the applicant had no interest whatever in " the subject matter, and was only actuated by spleen or " malevolence, and that it was for the public advantage that " the letters patent should not be assailed, instead of being " punished, he would be applauded." (2)

(1) Ellis & Blackburn, 354.

(2) And see the judgment of Wightman, J., in the same case, p. 333.

"The facts in the case before me as presented in the petition have, upon the principle I have above referred to, been controverted by the Bank and supported by the petitioner in numerous affidavits at great length, and he has in one of the supplementary affidavits stated for the first time that he was and is a shareholder in the Bank. It has been my duty to examine the various allegations which these affidavits and the documentary evidence submitted to me with them present for my consideration.

"The breaches of the terms of the charter of the Bank complained of in the Petition are as follows:—

- 1st. Taking a higher rate of interest than the law allows to be received by Banks,
- 2nd. Advancing money on real estate.
- 3rd. Advancing money on shares of the Bank.
- 4th. Advancing money on merchandise.
- 5th. Buying and selling chattels.
- 6th. Buying and selling real estate.
- 7th. Buying and selling shares of the Bank.

"All these breaches are averred in the petition to have taken place—denials, or explanations exculpatory, of all are given in the affidavits filed by the Bank, and re-assertions with many details and circumstances are submitted in the mass of counter affidavits and papers presented by the petitioner. I have caused a synopsis of the statements made in all these papers to be prepared and placed on record, but in the meantime will consider in succession each of the alleged breaches of the charter in the order in which they are above mentioned.

"1st. The maximum rate of interest which a Bank can recover by process of law is by the Banking Act fixed at seven per cent.; but by express enactment no penalty follows its having accepted payment of a higher rate, and to forfeit its charter would be the extreme penalty to which it could be subjected. I do not think there is anything in this alleged infraction of the Bank of St. Hyacinthe.

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" 2nd. Advancing money on real estate.

There does not appear to have been any advances made on real estate ; but after a debt of the ordinary character is incurred by a firm or firms, mortgages are taken as collateral to secure a debt already existing, giving time for the payment of such debts,—and taking renewals of the notes or bills which represent them at the time of the execution of the mortgages, or afterwards, is not contrary to law, and is not advancing money on real estate.

" 3rd. Advancing money on the shares of the Bank.

The transaction with Mr. Lippe was, I think, a legitimate one—there was no reason why he should not transfer Bank shares in trust to secure his indorser, nor why when the paper went into default the trustee, Mr. St. Jacques, should not transfer them to Mr. Beaudry, the indorser, to be sold to pay the paper.

4th. Advancing money on merchandise.

5th. Buying and selling chattels.

6th. Buying and selling real estate.

" These three alleged breaches may be considered together. The Bank of St. Hyacinthe, like most institutions of the kind, on many occasions, found itself under the necessity of dealing with insolvent debtors, and, to make the most of assets of which the Bank was the beneficiary, disposed, in some cases directly, in others through third persons, of merchandise and other chattels belonging to the estate of such insolvent debtors, and in other instances bought in the whole assets of the estate and had the business of the insolvent carried on for a certain time, buying additional stock to work out that already on hand, and buying or paying off on occasions, and even as independent transactions, mortgages made by the debtor on real estate which had not passed under his assignment, but which seem to promise to help to make the estate pay the liabilities to the Bank. In all the transactions under these three heads referred to in the mass of papers before me, I found that the Bank has

uniformly been in pursuit of the recovery or saving of some already existing debt, and not embarking in original purchase or sale of merchandise or chattels in the ordinary way of buyers and sellers. Any one familiar with the affairs of Banks in time of depression will quite understand how unwillingly managers are driven into such efforts to secure doubtful debts from danger. It is not necessary, I think, in an application of this kind, and when the object is such as it is here, that I should find categorically that each particular transaction complained of is in all its details an act within the powers of the Bank under its charter. I do not think any Bank in the Dominion could pass scathless through a searching investigation of that kind, but I certainly shall not use the discretion which the law in my judgment gives me to grant my *fiat* for a writ under which a person who does not aver that he has suffered injury from any of the alleged infractions (although a shareholder in the Bank and in a manufacturing company which the Bank advanced money to,) shall seek to have the charter of the Bank declared forfeited. I may add here that whatever may be said from a banker's point of view against the alleged purchase of the right of the debentures referred to in the petition, even if it were proved, which it was not, I think, I do not see in the transaction any violation of the Banking Act.

"7th. Buying and selling shares of the Bank.

"This is not established, I think, by the evidence, but many of the observations made under the preceding head applied to this—the transactions were all with reference to legitimate debts which the Bank was endeavouring to secure, and, as the Banking Act expressly gives a Bank a lien on shares held by a debtor, I do not think effect should be given to the objection to the course pursued by the Bank of St. Hyacinthe in the instance set forth in the papers before me.

"The petitioner in his factum calls attention to the last return to Government made by the Bank, which shows that the Cashier holds a large amount of the Stock of the Bank in

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trust, and points out the danger to the public which would result from the Bank owning a controlling share of its own stock. I quite agree with the petitioner as to the danger resulting from such an absorption of stock by a Bank, but in the present instance I cannot infer from the return that the stock mentioned therein as held *in trust* by the Cashier is held otherwise than as permitted by the section of the Banking Act, which gives the Bank a lien on the stock of shareholders for overdue debts.

"As to the *animus* by which the petitioner is actuated in taking these proceedings, I need only remark that its nature appears to me clearly established by the evidence, and that the declarations produced by the petitioner do not, in my judgment, rebut the conclusion that he is inspired by motives of personal vindictiveness.

"I may here remark, in passing, that there appears to me to be some force in the objection made by counsel, on behalf of the Bank, that the alleged infractions having all taken place before the 1st of July last, and the charter of the Bank having been renewed from that date by act of last session, no proceeding to forfeit the Bank's new charter can be taken on account of alleged violation of the old one. (1)

"It does not seem to me that any case is made out under the rules which I endeavored to lay down in the earlier part of this paper for the issue of a *scire facias* as prayed for. After a careful consideration of the petitioner's able and elaborate factum, and of the authorities quoted by him, the value of which latter has been in some degree lessened by the fact of their exact application not being in all cases pointed out,—and after weighing to the best of my ability

(1) It seems well established, however, that a renewal of a Bank charter is simply a *continuance* of the prior charter, and that the corporation succeeds both to the rights and to the *liabilities* of its predecessor. If the remarks of the Attorney General in the cited petition for *sci. fa.*, are the law on the point, no penalty provided for by the Bank Act can be imposed, unless proceedings are taken during the term of the charter in which the wrongful act is done. Is this the intent of the Legislature?

the evidence adduced on both sides, I am not satisfied that the officers of the Bank have intentionally and materially violated the terms of their Charter; and for an immaterial or unintentional breach of the terms of a Charter the Crown would not at the present day seek to forfeit a charter. I think that in the acts complained of they have, in dealing with real and personal property, been endeavouring to realize *quasi* securities for debts legitimately due to the Bank. It would be most lamentable if, under such circumstances, the Attorney General was compelled to grant his *fiat* for an inquiry so calculated to prejudice the Bank and its bill holders, depositors and general creditors, as well as the public in the locality where it does business. I am relieved to believe that no rule of law exists requiring a course fraught with so many evils to be pursued by the Attorney General.

I therefore decline to grant the prayer of the Petition." (1)

SECT. 2—INSOLVENCY.

A suspension by the Bank of payment of any of its liabilities as they accrue, in specie or Dominion notes, will, if it continues for ninety days, constitute the Bank insolvent, and operate a forfeiture of its charter or act of incorporation, so far as regards the issue or reissue of notes and other banking operations; and the charter or Act of incorporation will remain in force only for the purpose of enabling the directors or other lawful authority to make the calls mentioned in the 72nd section of the Act and to wind up its business. (2)

The question of insolvency is one which cannot be treated of at any length in the present work, (3) and we will therefore confine our inquiries solely to one or two points of universal interest.

(1) *Sarazin v. The Bank of St. Hyacinthe*, 28 L. C. J. 270.

(2) Section 71.

(3) The Author has in course of preparation a Work on INSOLVENCY, in which this subject will be found considered in a manner befitting its importance.

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THE LAW OF SET OFF.

Under the English Winding-up Act of 1862 (1) it has been held by the English courts that the object of the Act is to create a common fund, which is to be the source of payment for every creditor of the company; and that the liability of the contributories is a liability not to make payments to the creditors, but to contribute and make good to this common fund the amount required for the payment of all the liabilities of the insolvent Bank or company. (2)

The liability of a contributory for the debts of a company commences at the date when he entered into the contract, which made him a member or shareholder of the company, for under the Act (3) no other date can reasonably be assigned as "the time when such" contributory's liability commenced and under which he is bound to contribute to the assets of the company. (4)

Owing to this definition of the rights of creditors on the common fund for the payment of their debts, and the limited right of set-off allowed by the Imperial Act (5), the courts have held that the equitable principle of the bankruptcy law, that cross accounts should be set-off, was not incorporated into the winding up clauses of the English Companies Act of 1862. This appears from Lord Chelmsford's commentary on the Act in Grissell's case. (6)

"The Act," he says, "creates a scheme for the payment of the debts of a company in lieu of the old course of issuing execution against individual members. It removes the rights and liabilities of parties out of the sphere of the ordinary relation of debtor and creditor to which the law of set-off applies. Taking the Act as a whole, the call payable by

(1) 25 and 29 Vict., c. 89, Imp.

(2) *Webb. v. Whiffen*, L. R. 5 H. L. 711.

(3) Section 46, Imp Act. s. 77.

(4) *Ex parte Canwell*, 4 De G. J. & S. 539.

(5) Section 101.

(6) H. R., 1 Ch. 528.

a contributory is to come into the assets of the company, to be applied with the other assets in payment of debts ; to allow a set-off against the call would be contrary to the whole scope of the Act."

The only provision in the English Act allowing a right of set-off is the 101st section, which provides that a contributory in an unlimited company may set off a debt due to him by the company against a call, although the creditors have not been paid—evidently because he is liable to contribute to any amount until all the liabilities of the company are satisfied.

It has been decided that the principle of Grissell's case was not applicable to a voluntary winding up ; and the Court of Common Pleas in that case allowed a contributory to set off a debt due to him by the company against his liability on his shares. (1) But that case has since been disapproved of, and is no longer an authority. (2)

All the latter cases under the English Act affirm the principle of Grissell's case : and if the Canadian Winding Up Act was identical in the matter of set-off with the English Act, the rule laid down by the Judicial Committee of the Privy Council in *Trimble v. Hill* (3) would make the English decisions binding upon the courts in Canada—the rule being that where a Colonial Legislature has passed an Act in the same terms as an Imperial statute, and that statute, has been authoritatively construed by a Court of Appeal in England, such construction is to govern the courts of the colony.

But the Canadian Winding-up Act has two sections as to set off (4) which are not in its English original. The 57th section expressly imports the law of set-off into the liquida-

(1) *Brighton Arcade Co. v. Dowling*, L. R., 3 C. P. 175.

(2) *Re Whitehouse* 9 Ch. D. See also *Black & Co's case*, L. R., Ch. 254.

(3) 5 App. Cas., 342.

(4) Sections 57 and 73.

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tion proceedings in respect of (1) claims upon the estate of the company; and (2) all proceedings for the recovery of debts due or accruing due to the company at the commencement of the winding up, as if the company was not being wound up under the Act. The 73rd section excludes from set-off debts acquired by a contributory who knows, or has probable cause for believing, that the company is then insolvent, for the purpose of enabling such contributory to set-off such debts against his liability to the company.

Section 57 is a re-enactment of the 107th section of the Insolvent Act, 1875, and is similar to the sections respecting set-off found in the Insolvent Acts of 1865 (s. 24) and of 1869 (s. 124). Its applicability to the claim of set-off made by the contributories in any case must depend upon the words "debts due and accruing due to the company at the commencement of the winding up" to the sections of the Act defining the liability of contributories.

These sections are the 44th, which declares that the amount for which each shareholder is liable in respect of his unpaid shares, or his liability under the Act of incorporation or otherwise, shall be "a debt due to the company" and the 46th, which says that the liability of a contributory under the Act shall be a "debt accruing due from such person at the time when his liability commenced." The words in section 44, liability under the Act of incorporation of the company, cover the claim of the bank under the double liability clause of the Bank Act.

Applying the well-known canon of construction that where the same words occur in different parts of the same statute they must be taken to be everywhere used in the same sense, (1) it would seem reasonable to hold that the words "debts due and accruing due to the company," "being found in the sections defining the liability of contributories and the sec-

(1) Dwarries on Statutes, 574.

tion giving the right of set-off—that contributories, although shareholders, have grounds for claiming that they come within the operation of the 57th clause providing for the set-off of debts.

This view is further supported by the interpretation given by Lord Westbury to the words used in the 46th section (Eng., s. 75), "debt accruing due from such person at the time when his liability commenced," which, as has been already shown, he held to be the date when the contributory became a member and shareholder in the company. (1)

But apart from these considerations, the intention of the Legislature in excluding, under s. 74, the right of set-off in the special cases there legislated against, may be referred to as evidence that set-off was to be allowed to contributories in other cases. According to another canon of construction the exception indicates that what is excepted would otherwise have been included in the statute. (2)

Against the conclusions which have thus been arrived at in Ontario (3) is an adverse judgment of a Quebec judge on this same question of set-off. Mr. Justice Papineau of the Superior Court held that contributories had no right under the provisions of the Winding Up Act to set off debts or deposits due to them by the bank against their liability under the Bank Act: even where, as in the case before him, the liquidators had allowed the contributory to set off a portion of his deposit as a creditor against his liability on the first call. (4)

SECT. 3.—THE WINDING UP ACT.

The following is the text of the winding up act:—

(1) Ex parte Canwell, 4 De G. J. & S. 539.

(2) Dwaris on Statutes, 516.

(3) Ex parte Harrison and Standing, May, 1888.

(4) The Exchange Bank v. Burland, 7 L. N. 18. (1885.)

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An Act respecting Insolvent Banks, Insurance Companies, Loan Companies, Building Societies, and Trading Corporations. A. D. 1886.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :

SHORT TITLE.

1. This Act may be cited as "*The Winding Up Act.*" Short title.

INTERPRETATION.

2. In this Act, unless the context otherwise requires,— Interpretation.
"Company."

(a.) The expression "company" includes any corporation subject to the provisions of this Act ;

(b.) The expression "insurance company" means a company carrying on, either as a mutual or a stock company, the business of insurance, whether life, fire, marine, ocean or inland marine, accident, guarantee or otherwise ; "Insurance
company."

(c.) The expression "trading company" means any company, except a railway or telegraph company, carrying on business similar to that carried on by apothecaries, auctioneers, bankers, brokers, brickmakers, builders, carpenters, carriers, cattle or sheep salesmen, coach proprietors, dyers, fullers, keepers of inns, taverns, hotels, saloons or coffee houses, lime burners, livery stable keepers, market gardeners, millers, miners, packers, printers, quarrymen, share-brokers, ship-owners, shipwrights, stock-brokers, stock-jobbers, victuallers, warehousemen, wharfingers, persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment or otherwise, in gross or by retail, or by persons who, either for themselves, or as agents or factors for others, seek their living by buying and selling or buying and letting for hire goods or commodities, or by the manufacture, "Trading
company."

workmanship or the conversion of goods or commodities or trees ;

"Court."

(d.) The expression "court" means, in the Province of Ontario, the High Court of Justice for Ontario ; in the Province of Quebec, the Superior Court for Lower Canada ; in the Province of Nova Scotia, the Supreme Court ; in the Province of New Brunswick, the Supreme Court ; in the Province of Prince Edward Island, the Supreme Court ; in the Province of British Columbia, the Supreme Court ; in the Province of Manitoba, Her Majesty's Court of Queen's Bench for Manitoba ; in the North-West Territories the Supreme Court of the North-West Territories ; and in the District of Keewatin, such court or magistrate or other judicial authority as is designated, from time to time, by proclamation of the Governor in Council, published in the *Canada Gazette*.

"Official
"Gazette."

(e.) The expression "Official Gazette" means the *Canada Gazette* and the Gazette published under the authority of the Government of the Province, where the proceedings for the winding-up of the business of the company are carried on, or used as the official means of communication between the Lieutenant Governor and the people ; and if no such Gazette is published, then it means any newspaper published in the Province, which is designated by the court for publishing the notices required by this Act ;

"Contributory."

(f.) The expression "contributory" means a person liable to contribute to the assets of a company under this Act ; it also, in all proceedings for determining the persons who are to be deemed contributories, and in all proceedings prior to the final determination of such persons, includes any person alleged to be a contributory ;

"Winding-up
"order."

(g.) The expression "winding-up order" means an order granted by the court under this Act to wind up the business of the company, and includes any order granted by the court to bring within the provisions of this Act any company in liquidation or in process of being wound up. 45 V., c. 23, ss. 3, 4, 5, 6, 8 and 13, *part* ;—49 V., c. 25, s. 14.

APPLICATION OF ACT.

3. This Act applies to incorporated banks, saving banks, incorporated insurance companies, loan companies having

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borrowing powers, building societies, having a capital stock, and incorporated trading companies, doing business in Canada, wheresoever incorporated; and—

(a.) Which are insolvent; or—

(b.) Which are in liquidation or in process of being wound up, and on petition by any of their shareholders or creditors, assignees or liquidators, ask to be brought under the provisions of this Act;

2. This Act does not apply to railway or telegraph companies or to building societies which have not a capital stock. 47 V., c. 39, s. 1. Certain corporations excepted.

4. The provisions of sections eight to ninety-six, both inclusive, are, in the case of a bank other than a savings bank, subject to the provisions contained in sections ninety-seven to one hundred and four, both inclusive; and, in the case of an insurance company, the provisions of sections eight to ninety-six, both inclusive, are subject to the provisions contained in sections one hundred and five to one hundred and twenty-three, both inclusive. 45 V., c. 23, s. 2. Application of certain sections.

WHEN COMPANY DEEMED INSOLVENT.

5. A company is deemed insolvent—

(a.) If it is unable to pay its debts as they become due;

(b.) If it calls a meeting of its creditors for the purpose of compounding with them;

(c.) If it exhibits a statement showing its inability to meet its liabilities;

(d.) If it has otherwise acknowledged its insolvency;

(e.) If it assigns, removes or disposes of, or attempts or is about to assign, remove or dispose of, any of its property, with intent to defraud, defeat or delay its creditors, or any of them;

(f.) If, with such intent, it has procured its money, goods, chattels, lands or property to be seized, levied on or taken, under or by any process or execution;

(g.) If it has made any general conveyance or assignment of its property for the benefit of its creditors, or if, being unable to meet its liabilities in full, it makes any sale or con-

When a company shall be deemed insolvent.

veyance of the whole or the main part of its stock in trade or assets, without the consent of its creditors, or without satisfying their claims;

(4.) If it permits any execution issued against it, under which any of its goods, chattels, land or property are seized, levied upon or taken in execution, to remain unsatisfied till within four days of the time fixed by the sheriff or proper officer for the sale thereof, or for fifteen days after such seizure. 45 V., c. 23, s. 9.

When a company shall be deemed unable to pay its debts.

6. A company is deemed to be unable to pay its debts as they become due, whenever a creditor, to whom the company is indebted in a sum exceeding two hundred dollars then due, has served on the company, in the manner in which process may legally be served on it in the place where service is made, a demand in writing, requiring the company to pay the sum so due, and the company has, for ninety days, in the case of a bank, and for sixty days in all other cases, next succeeding the service of the demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor. 45 V., c. 23, ss. 10 and 11.

PROCEEDINGS FOR WINDING-UP ORDER.

When winding-up commences.

7. The winding-up of the business of a company shall be deemed to commence at the time of the service of the notice of presentation of the petition for winding up. 45 V., c. 23, s. 12.

Application to court for winding-up order.

8. When a company becomes insolvent, a creditor for the sum of at least two hundred dollars may, after four days' notice of the application to the company, apply by petition to the court in the Province where the head office of the company is situated, or if there is no head office in Canada, then in the Province where its chief place or one of its chief places of business is situated, for a winding up order. 45 V., c. 23, s. 13, *part*.

Power of court on the application.

9. The court may make the order applied for, may dismiss the petition with or without costs, may adjourn the hearing conditionally or unconditionally, or may make any interim or other order that it deems just. 45 V., c. 23, s. 14.

If company opposes application.

10. If the company opposes the application, on the ground that it has not become insolvent within the meaning of this

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Act, or that its suspension or default was only temporary, and was not caused by any deficiency in its assets, and shows reasonable cause for believing that such opposition is well founded, the court in its discretion may, from time to time, adjourn the proceedings upon such application for a time not exceeding six months from the date of the application,—and may order an accountant, or other person, to inquire into the affairs of the company, and to report thereon within a period not exceeding thirty days from the date of such order. 45 V., c. 23, s. 15.

Court may adjourn the proceedings and order inquiry.

11. Upon the service on the company of an order made under the next preceding section, for an inquiry into the affairs of the company, the president, directors, officers and employees of the company and every other person shall respectively exhibit to the accountant or other person named for the purpose of making such inquiry, the books of account of the company, and all inventories, papers and vouchers referring to the business of the company or of any person therewith, which are in his or their possession, custody or control, respectively ; and they shall also respectively give all such information as is required by such accountant or other person as aforesaid, in order to form a just estimate of the affairs of the company ; and any refusal on the part of the president, directors, officers or employees of the company to give such information shall be a contempt of the court, and shall be punishable by fine or imprisonment, or by both, in the discretion of the court. 45 V., c. 23, s. 16.

Duty of company and its officers if inquiry is ordered.

Punishment for refusal to give information.

12. Upon receiving the report of the accountant or person ordered to inquire into the affairs of the company, and after hearing such shareholders or creditors of the company as desire to be heard thereon, the court may either refuse the application or make the winding-up order. 45 V., c. 23, s. 17.

Power of the court after report on inquiry.

13. The court may, upon the application of the company, or of any creditor or contributory, at any time after the presentation of a petition for a winding-up order and before making the order restrain further proceedings in any action, suit or proceeding against the company, upon such terms as the court thinks fit. 45 V., c. 23, s. 18.

Actions against company may be restrained.

As to companies in liquidation on 17th May, 1882.

Liquidator in such case.

Company to cease business.

Transfer of shares void.

Corporate state continued.

After winding-up order, actions against company stayed.

Executions, &c., against company void.

Court may stay winding-up proceedings.

14. Any shareholder, creditor, assignee, receiver or liquidator of any company, which was in liquidation or in process of being wound up on the seventeenth day of May, one thousand eight hundred and eighty-two, may apply, by petition, to the court, asking that the company may be brought within and under the provisions of this Act, and the court may make such order; and the winding up of such company shall thereafter be carried on under this Act:

2. The court, in making such order, may direct that the assignee, receiver or liquidator of such company, if one has been appointed, shall become the liquidator of the company under this Act, or may appoint some other person to be liquidator of the company. 47 V., c. 39, ss. 2 and 3.

PROCEEDINGS AFTER WINDING-UP ORDER IS MADE.

15. The company, from the time of the making of the winding-up order, shall cease to carry on its business, except in so far as is, in the opinion of the liquidator, required for the beneficial winding-up thereof:

2. All transfers of shares, except transfers made to or with the sanction of the liquidators, under the authority of the court, and every alteration in the status of the members of the company, after the commencement of such winding up, shall be void; but the corporate state and all the corporate powers of the company, notwithstanding it is otherwise provided by the Act, charter or instrument of incorporation, shall continue until the affairs of the company are wound up. 45 V., c. 23, s. 19.

16. When the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the court, and subject to such terms as the court imposes. 45 V., c. 23, s. 20.

17. Every attachment, sequestration, distress or execution put in force against the estate or effects of the company after the making of the winding-up order shall be void. 45 V., c. 23, s. 21.

18. The court may, upon the application of any creditor or contributory, at any time after the winding-up order is made, and upon proof, to the satisfaction of the court, that all pro-

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2. In amount shareho on each of the preliminar meeting

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ceedings in relation to the winding-up ought to be stayed, make an order staying the same, either altogether or for a limited time, on such terms and subject to such conditions as it deems fit. 45 V., c. 23, s. 22.

19. The court may, as to it seems just, as to all matters relating to the winding-up, have regard to the wishes of the creditors, contributories, shareholders or members, as proved to it by any sufficient evidence, and may, if it thinks it expedient, direct meetings of the creditors, contributories, shareholders or members to be summoned, held and conducted in such manner as the court directs, for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the court:

Wishes of creditors, &c., how ascertained

2. In the case of creditors, regard shall be had to the amount of the debt due to each creditor, and in the case of shareholders or members, to the number of votes conferred on each shareholder or member by law or by the regulations of the company; and the court may prescribe the mode of preliminary proof of creditors' claims for the purpose of the meeting. 45 V., c. 23, s. 23.

As to amount of claim and number of votes on shares.

Court may require proof.

LIQUIDATORS.

20. The court, in making the winding-up order, may appoint a liquidator or more than one liquidator of the estate and effects of the company; but no such liquidator shall be appointed unless a previous notice is given to the creditors, contributories, shareholders, or members, in the manner and form prescribed by the court. 45 V., c. 23, s. 24;—47 V., c. 39, s. 4.

Liquidator to be appointed.

21. An incorporated company may be appointed liquidator to the goods and effects of a company under this Act; and if an incorporated company is so appointed, it may act through one or more of its principal officers designated by the court. 45 V., c. 23, s. 25.

An incorporated company may be appointed.

22. The court may, if it thinks fit, after the appointment of one or more liquidators, appoint additional liquidators. 45 V., c. 23, s. 26.

Additional liquidators.

- Quorum.** **23.** If more than one liquidator is appointed, the court may declare whether any act to be done by a liquidator is to be done by all or any one or more of the liquidators. 45 V., c. 23, s. 27.
- Security.** **24.** The court may also determine what security shall be given by a liquidator on his appointment. 45 V., c. 23, s. 28.
- If no liquidator.** **25.** If at any time there is no liquidator, all the property of the company shall be deemed to be in the custody of the court. 45 V., c. 23, s. 29.
- Provisional liquidator.** **26.** The court may, at any time after the presentation of the petition, and before the first appointment of a liquidator, appoint provisionally a liquidator of the estate and effects of the company. 45 V., c. 23, s. 30.
- Resignation or removal.** **27.** A liquidator may resign or may be removed by the court on due cause shown, and every vacancy in the office of liquidator shall be filled by the court. 45 V., c. 23, s. 31.
- Remuneration.** **28.** The liquidator shall be paid such salary or remuneration, by way of percentage or otherwise, as the court directs, upon such notice to the creditors, contributories, shareholders or members, as the court orders; and if there is more than one liquidator, the remuneration shall be distributed amongst them in such proportions as the court directs. 45 V., c. 23, s. 32.
- Description.** **29.** In all proceedings connected with the company a liquidator shall be described as the "liquidator of the (*name of company*)," and not by his individual name only. 45 V., c. 23, s. 33.
- Duties after appointment.** **30.** The liquidator, upon his appointment, shall take into his custody or under his control, all the property, effects and choses in action to which the company is or appears to be entitled; and he shall perform such duties in reference to winding up the business of the company as are imposed by the court or by this Act. 45 V., c. 23, s. 34.
- Powers.** **31.** The liquidator may, with the approval of the court, and upon such previous notice to the creditors, contributories, shareholders or members, as the court orders—
- Suits.** (*a.*) Bring or defend any action, suit or prosecution or other legal proceeding, civil or criminal, in his own name as liqui-

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dator, or in the name or on behalf of the company, as the case may be ;

(b.) Carry on the business of the company as far as is necessary to the beneficial winding-up of the same ; Business of company.

(c.) Sell the real and personal and heritable and movable property, effects and choses in action of the company, by public auction or private contract, and transfer the whole thereof to any person or company, or sell the same in parcels ; Sale of property.

(d.) Do all acts, and execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose use, when necessary, the seal of the company. General acts.

(e.) Prove, rank, claim and draw dividends in the matter of the bankruptcy, insolvency or sequestration of any contributory, for any balance against the estate of such contributory, and take and receive dividends in respect of such balance in the matter of the bankruptcy, insolvency or sequestration as a separate debt due from such bankrupt or insolvent and ratably with the other separate creditors ; Proving in bankruptcy, &c.

(f.) Draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company ; raise upon the security of the assets of the company, from time to time, any requisite sum or sums of money ; and the drawing, accepting, making or indorsing of every such bill of exchange or promissory note, as aforesaid, on behalf of the company, shall have the same effect, with respect to the liability of such company, as if such bill or note had been drawn, accepted, made or indorsed by or on behalf of such company in the course of the carrying on of its business ; Drawing or indorsing bills, &c., and raising moneys.

(g.) Do and execute all such other things as are necessary for winding up the affairs of the company and distributing its assets. General powers. 45 V., c. 23, s. 35.

32. The liquidator may, with the approval of the court, appoint a solicitor or law agent to assist him in the performance of his duties. When solicitor may be appointed. 45 V., c. 23, s. 36.

33. The liquidator may, with the approval of the court, compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, whether present or future, certain or contingent, ascertained or sounding Debts, &c., due to the company may be compromised.

only in damages, subsisting or supposed to subsist between the company and any contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets of the company or the winding up of the company upon the receipt of such sums, payable at such times, and generally upon such terms, as are agreed upon; and may take any security for the discharge of such debts or liabilities, and give a complete discharge in respect of all or any such calls, debts or liabilities. 45 V., c. 23, s. 37.

Powers of directors to cease.

34 Upon the appointment of the liquidator, all the powers of the directors shall cease, except in so far as the court or the liquidator sanctions the continuance of such powers. 45 V., c. 23, s. 38.

Moneys to be deposited in bank.

35. The liquidator shall deposit at interest in some chartered bank or post office savings bank or other Government savings bank designated by the court, all sums of money which he has in his hands belonging to the company, whenever and so often as such sums amount to one hundred dollars. 45 V., c. 23, s. 39.

A separate deposit account to be kept.

36. Such deposits shall not be made in the name of the liquidator individually, on pain of dismissal; but a separate account shall be kept for the company of the moneys belonging to the company in the name of the liquidator as such liquidator. 45 V., c. 23, s. 40.

Bank book to be produced at meeting.

37. At every meeting of the contributories, creditors, shareholders or members, the liquidator shall produce a bank pass book, showing the amount of the deposits made for the company, the dates at which such deposits were made, the amount withdrawn and dates of such withdrawal,—of which production mention shall be made in the minutes of such meeting; and the absence of such mention shall be *prima facie* evidence that such pass book was not produced at the meeting. 45 V., c. 23, s. 41.

And on order of Court.

38. The liquidator shall also produce such pass book whenever ordered so to do by the court, and on his refusal so to do he may be treated as being in contempt of the court. 45 V., c. 23, s. 42.

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39. The liquidator shall be subject to the summary jurisdiction of the court in the same manner and to the same extent as the ordinary officers of the court are subject to its jurisdiction; and the performance of his duties may be compelled, and all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, lien or right of property upon, in or to any effects or property in the hands, possession or custody of a liquidator, may be obtained by an order of the court on summary petition, and not by any action, suit, attachment, seizure or any other proceeding of any kind whatsoever; and obedience by the liquidator to such order may be enforced by the court under the penalty of imprisonment, as for contempt of court or disobedience thereto; and he may be removed, in the discretion of the court. 45 V., c. 23, s. 43.

Liquidator subject to summary jurisdiction of court.

Remedies against estate obtained by summary order and not by suit, &c.

40. The liquidator shall, within three days after the date of the final winding-up of the business of the company, deposit in the bank appointed or designated as hereinbefore provided, any other money belonging to the estate then in his hands not required for any other purpose authorized by this Act, with a sworn statement and account of such money, and that the same is all that he has in his hands; and he shall incur a penalty not exceeding ten dollars, and not less than ten per cent. per annum interest upon the sums in his hands for every day on which he neglects or delays such payment; and he shall be deemed to be a debtor to Her Majesty for such money, and may be compelled as such to account for and pay over the same. 45 V., c. 23, s. 44.

Balance on hand by liquidator after final winding up to be deposited.

Penalty for neglect.

41. The money so deposited shall be left for three years in the bank, subject to be claimed by those entitled thereto, and shall be then paid over, with the interest, to the Minister of Finance and Receiver General, and if afterwards claimed, shall be paid to the person entitled thereto. 45 V., c. 23, s. 45.

If not claimed to be paid to Receiver General.

CONTRIBUTORIES.

42. As soon as may be after commencement of the winding up of a company the court shall settle a list of contributories. 45 V., c. 23, s. 46.

List of contributories.

43. In the list of contributories, persons who are contributories in their own right shall be distinguished from persons

List of contributories must distinguish

between those in right and those in a representative capacity.

who are contributories as representatives of or liable for the debts of others ; and it shall not be necessary where the personal representative of any deceased contributory is placed on the list, to add the heirs or devisees of such contributory, but such heirs or devisees may be added as and when the court thinks fit. 45 V., c. 23, s. 47.

Liability of shareholders or their representatives.

44. Every shareholder or member of the company or his representative shall be liable to contribute the amount unpaid on his shares of the capital, or on his liability to the company, or to its members or creditors, as the case may be, under the Act, charter or instrument of incorporation of the company, or otherwise ; and the amount which he is liable to contribute shall be deemed an asset of the company, and a debt due to the company, payable as directed or appointed under this Act. 45 V., c. 23, s. 48.

Liability after transfer of shares, &c.

45. If a shareholder has transferred his shares under circumstances which do not, by law, free him from liability in respect thereof, or if he is by law liable to the company or its members or creditors, as the case may be, to an amount beyond the amount unpaid on his shares, he shall be deemed a member of the company for the purposes of this Act, and shall be liable to contribute, as aforesaid, to the extent of his liabilities to the company or its members or creditors, independently of this Act ; and the amount which he is so liable to contribute shall be deemed an asset and a debt as aforesaid. 45 V., c. 23, s. 49.

Nature of liability of a contributory.

46. The liability of any person to contribute to the assets of a company under this Act, in the event of the business of the same being wound up, shall create a debt accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made, as hereinafter mentioned, for enforcing such liability ; and in the case of the bankruptcy or insolvency of any contributory, the estimated value of his liability to future calls, as well as calls already made, may be proved against his estate. 45 V., c. 23, s. 50, *part*.

Trustee, &c., of Company may be ordered to pay over

47. The court may, at any time after making a winding-up order, require any contributory for the time being settled on the list of contributories as trustee, receiver, banker, agent or

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officer of the company, to pay, deliver, convey, surrender or ^{balance and} transfer forthwith, or within such time as the courts directs, to ^{deliver books,} or into the hands of the liquidator, any sum or balance, books, papers, estate or effects which are in his hands for the time being, and to which the company is *prima facie* entitled. 45 V., c. 23, s. 51.

48. The court may, at any time after making a winding-up order, make an order on any contributory for the time being settled on the list of contributories, directing payment to be made, in manner in the said order mentioned, of any moneys due from him or from the estate of the person whom he represents, to the company, exclusive of any moneys which he or the estate of the person whom he represents is liable to contribute by virtue of any call made in pursuance of this Act. 45 V., c. 23, s. 52. ^{Court may order debtors of company to pay.}

49. The court may, at any time after making a winding-up order, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of contributories, to the extent of their liability, for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding-up, and for the adjustment of the rights of the contributories amongst themselves; and the court may, in making a call, take into consideration the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same: ^{When calls may be made on contributories} ^{Provido,} Provided, however, that no call shall compel payment of a debt before the maturity thereof, and that the extent of the liability of any contributory shall not be increased by anything in this section contained. 45 V., c. 23, s. 50, *part*, and s. 53.

50. The court may order any contributory, purchaser or other person from whom money is due to the company, to pay the same into some chartered bank or post office savings bank, or other Government savings bank, to the account of the court, instead of to the liquidator; and such order may be enforced in the same manner as if it had directed payment to the liquidator. 45 V., c. 23, s. 54. ^{Moneys may be ordered to be paid into court.}

Distribution of surplus.

51. The court shall adjust the rights of the contributories among themselves, and distribute, among the persons entitled thereto, any surplus that remains. 45 V., c. 23, s. 55.

Contributory or official about to abscond, &c., may be arrested.

52. The court may, at any time before or after it has made a winding-up order, upon proof being given that there is reasonable cause for believing that any contributory or any past or present director, manager, officer or employee of the company is about to quit Canada or otherwise abscond, or to remove or conceal any of his goods or chattels, for the purpose of evading payment of calls, or for avoiding examination in respect of the affairs of the company, cause such person to be arrested, and his books, papers, moneys, securities for moneys, goods and chattels to be seized, and him or them to be safely kept until such time as the court orders. 45 V., c. 23, s. 56.

And his papers, may be seized.

Books, &c., of company to be *prima facie* evidence as between contributories.

53. If the business of a company is being wound up under this Act, all books of the company and of the liquidators shall, as between the contributories of the company, be *prima facie* evidence of the truth of all matters purporting to be therein recorded. 45 V., c. 23, s. 57.

Court may allow inspection by creditors, &c., of company's books, &c.

54. After a winding-up order has been made, the court may make such order for the inspection, by the creditors, shareholders, members or contributories of the company, of its books and papers, as the court thinks just; and any books and papers in the possession of the company may be inspected in conformity with the order of the court, but not further or otherwise. 45 V., c. 23, s. 58.

Person entitled to vote to do so personally or by written proxy.

55. No contributory, creditor, shareholder, or member shall vote at any meeting, unless present personally or represented by some person acting under a written authority, filed with the chairman or liquidator, to act as such representative at the meeting, or generally. 45 V., c. 23, s. 59.

CREDITORS' CLAIMS.

What debts may be proved against the company.

56. When the business of a company is being wound up under this Act, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be

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admissible to proof against the company,—a just estimate being made, as far as is possible, of the value of all such debts or claims as are subject to any contingency or sound only in damages, or which, for some other reason, do not bear as certain value :

2. Clerks and other persons in or having been in the employment of the company in, or about its business or trade, shall be collocated in the dividend sheet by special privilege over other creditors, for any arrears of salary or wages due and unpaid to them at the time of the making of the winding-up order, not exceeding the arrears which have accrued to them during the three months next previous to the date of such order. 45 V., c. 23, s. 60, *part* ;—49 V., c. 46, s. 1.

Privilege of claims of clerks and employees allowed to a certain extent.

57. The law of set-off, as administered by the courts, whether of law or equity, shall apply to all claims upon the estate of the company, and to all proceedings for the recovery or debts due or accruing due to the company at the commencement of the winding up, in the same manner and to the same extent as if the business of the company was not being wound up under this Act. 45 V., c. 23, s. 60, *part*.

Law of set-off to apply.

58. The property of the company shall be applied to the satisfaction of its liabilities and the charges incurred in winding up its affairs ; and unless it is otherwise provided by law or by the Act, charter or instrument of incorporation, any property or assets remaining shall be distributed amongst the members or shareholders, according to their rights and interests in the company. 45 V., c. 23, s. 61.

Distribution of property of company.

59. The court may fix a certain day or certain days on or within which creditors of the company and others who have claims thereon may send in their claims. 45 V., c. 23, s. 62.

When creditors must send in claims.

60. When the liquidator has given such notices of the said day as are ordered by the court, the liquidator may, at the expiration of the time named in the said notices or the last of the said notices, for sending in such claims, distribute the assets of the company, or any part thereof, amongst the persons entitled thereto, having regard to the claims of which the liquidator then has notice ; and the liquidator shall not be liable to any person of whose claim the liquidator had not

After expiration of time for sending in claims, assets may be distributed.

notice at the time of distributing the said assets, or a part thereof, as the case may be, for the assets or any part thereof so distributed. 45 V., c. 23, s. 63.

Creditors may be compromised with.

61. The liquidator may, with the approval of the court, make such compromise or other arrangement as the liquidator deems expedient with creditors or persons claiming to be creditors, or persons having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages, against the company, or whereby the company may be rendered liable. 45 V., c. 23, s. 64.

Duty of creditors holding security.

62. If a creditor holds security upon the estate of the company, he shall specify the nature and amount of such security in his claim, and shall therein, on his oath, put a specified value thereon; and the liquidator, under the authority of the court, may either consent to the retention of the property and effects constituting such security or on which it attaches, by the creditor, at such specified value, or he may require from such creditor an assignment and delivery of such security, property and effects, at such specified value, to be paid by him out of the estate so soon as he has realized such security, together with interest on such value from the date of filing the claim till payment; and in case of such retention the difference between the value, at which the security is retained and the amount of the claim of such creditor, shall be the amount for which he may rank as aforesaid; and if a creditor holds a claim based upon negotiable instruments upon which the company is only indirectly or secondarily liable, and which is not mature or exigible, such creditor will be considered to hold security within the meaning of the section, and shall put a value on the liability of the person primarily liable thereon as being his security for the present thereof; but after the maturity of such liability and its non-payment, he shall be entitled to amend and revalue his claim. 45 V., c. 23, s. 65.

Security by negotiable instruments.

63. If the security consists of a mortgage upon ships or shipping, or upon real property, or of a registered judgment or an execution binding real property and expected from the operation of section sixty-six of this Act, the property mortgaged or bound shall only be assigned and delivered to the creditor, subject to all previous mortgages, judgments, executions, hypothecs and liens thereon, holding rank and priority

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before his claim, and upon his assuming and binding himself to pay all such previous mortgages, judgments, executions, hypothecs and liens, and upon his securing the estate of the company to the satisfaction of the liquidator against any claim by reason of such previous mortgages, judgments, executions, hypothecs and liens; and if there are mortgages, judgments, executions, hypothecs or liens thereon, subsequent to those of such creditor, he shall only obtain the property by consent of the subsequently secured creditors, or upon their filing their claims, specifying their security thereon as of no value, or upon his paying them the value by them placed thereon, or upon his securing the estate of the company to the satisfaction of the liquidator against any claim by reason of such subsequent mortgages, judgments, executions, hypothecs and liens. 45 V., c. 23, s. 66.

64. Upon a secured claim being filed, with a valuation of the security, the liquidator shall procure the authority of the court to consent to the retention of the security by the creditor, or shall require from him an assignment and delivery thereof. 45 V., c. 23, s. 67.

Duty of liquidator if a secured claim is filed.

65. In the preparation of the dividend sheet, due regard shall be had to the rank and privilege of every creditor, but no dividend shall be allotted or paid to any creditor holding security upon the estate of the company for his claim, until the amount for which he may rank as a creditor upon the estate, as to dividends therefrom, is established, as herein provided. 45 V., c. 23, s. 68.

Rank, &c., on dividend sheet.

66. No lien or privilege upon either the real or personal property of the company shall be created for the amount of any judgment debt, or of the interest thereon, by the issue or delivery to the sheriff of any writ of execution, or by levying upon or seizing under such writ the effects or estate of the company; nor shall any lien, claim or privilege be created upon the real or personal property of the company or upon any debts due or accruing or becoming due to the company, by the filing or registering of any memorial or minute of judgment, or by the issue or making of the attachment or garnishee order or other process or proceeding, if, before the payment over to the plaintiff of the moneys

No lien by judgment and execution.

This provision
not to apply to
lien for costs.

actually levied, paid or received under such writ, memorial, minute, attachment, garnishee, order or other process or proceeding, the winding-up of the business of the company has commenced; but this section shall not effect any lien or privilege for costs, which the plaintiff possesses under the law of the Province in which such writ, attachment, garnishee order or other process or proceeding was issued. 45 V., c. 23, s. 69. *part.*

Claim or
dividend may
be objected to.

67. Any creditor or contributory or shareholder or member may object to any claim filed with the liquidator, or to any dividend declared :

Objections to be
filed in writing.

2. If a claim or a dividend is objected to, the objections shall be filed in writing with the liquidator, together with evidence of the previous service of a copy thereof on the claimant :

Answers and
replies.

3. The claimant shall have six days to answer the objections, or such further time as the court allows, and the contestant shall have three days to reply, or such further time as the court allows :

Day to be fixed
for hearing.

4. Upon the completion of the issues upon the objections, the liquidator shall transmit to the court all necessary papers relating to the contestation, and the court shall then, on the application of either party, fix a day for taking evidence upon the contestation, and hearing and determining the same :

Costs.

5. The court may make such order as seems proper in respect to the payment of the costs of the contestation by either party, or out of the estate of the company :

If claimant does
not answer
objections.

6. If, after a claim or dividend has been duly objected to, the claimant does not answer the objections, the court may, on the application of the contestant, make an order barring the claim or correcting the dividend, or may make such other order in reference thereto as appears right :

Security for
costs.

7. The court may order the person objecting to a claim or dividend to give security for the costs of the contestation within a limited time, and may, in default, dismiss the contestation or stay proceedings thereon, upon such terms as the court thinks just. 45 V., c. 23, s. 70.

FRAUDULENT PREFERENCES.

Gratuitous
contracts, &c.,
to be void.

68. All gratuitous contracts, or conveyances or contracts without consideration, or with a merely nominal considera-

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tion, respecting either real or personal property, made by a company in respect to which a winding-up order under this Act is afterwards made, with or to any person whatsoever (whether such person is its creditor or not), within three months next preceding the commencement of the winding-up or at any time afterwards,—and all contracts by which creditors are injured, obstructed or delayed, made by a company unable to meet its engagements and in respect to which a winding-up order under this Act is afterwards made with a person knowing such inability or having probable cause for believing such inability to exist, or after such inability is public and notorious (whether such person is its creditor or not) shall be presumed to be made with intent to defraud its creditors. 45 V., c. 23, s. 71.

Contracts
injuring or
obstructing creditors.

69. A contract or conveyance for consideration, respecting either real or personal property, by which creditors are injured or obstructed, made by a company unable to meet its engagements with a person ignorant of such inability, whether such person is its creditor or not, and before such inability has become public and notorious, but within thirty days next before the commencement of the winding-up of the business of such company under this Act, or at any time afterwards, is voidable, and may be set aside by any court of competent jurisdiction, upon such terms as to the protection of such person from actual loss or liability by reason of such contract, as the court orders. 45 V., c. 23, s. 72.

When contracts
with consideration shall be
voidable.

70. All contracts or conveyances made and acts done by a company, respecting either real or personal property, with intent fraudulently to impede, obstruct or delay its creditors in their remedies against it, or with intent to defraud its creditors or any of them,—and so made, done and intended with the knowledge of the person contracting or acting with the company, whether such person is its creditor or not,—and which have the effect of impeding, obstructing or delaying the creditors of their remedies, or of injuring them, or any of them, shall be null and void. 45 V., c. 23, s. 73.

As to contracts
made in fraud
or to obstruct or
delay creditors.

71. If any sale, deposit, pledge or transfer is made of any property, real or personal, by a company in contemplation of insolvency under this Act, by way of security for payment

Securities given
by company for
payment, when
to be void.

to any creditor,—or if any property, real or personal, movable or immovable, goods, effects or valuable security, are given by way of payment by such company to any creditor, whereby such creditor obtains or will obtain an unjust preference over the other creditors, such sale, deposit, pledge, transfer or payment shall be null and void ; and the subject thereof may be recovered back for the benefit of the estate by the liquidator, in any court of competent jurisdiction ; and if the same is made within thirty days next before the commencement of the winding-up under this Act, or at any time afterwards, it shall be presumed to have been so made in contemplation of insolvency. 45 V., c. 23, s. 74.

Payments by
company when
to be void.

Proviso.

As to debts of
company
transferred to
contributories.

72. Every payment made within thirty days next before the commencement of the winding-up under this Act by a company unable to meet its engagements in full, to a person knowing such inability, or having probable cause for believing the same to exist, shall be void, and the amount paid may be recovered back by the liquidator by suit or action in any court of competent jurisdiction : but if any valuable security is given up in consideration of such payment, such security or the value thereof shall be restored to the creditor upon the return of such payment. 45 V., c. 23, s. 75.

73. When a debt due or owing by the company has been transferred within the time and under the circumstances in the next preceding section mentioned, or at any time afterwards, to a contributory who knows or has probable cause for believing the company to be unable to meet its engagements, or in contemplation of its insolvency under this Act, for the purpose of enabling such contributory to set up, by way of compensation or set-off, the debt so transferred, such debt shall not be set up by way of compensation or set-off against the claim upon such contributory. 45 V., c. 23, s. 76.

APPEALS.

Appeals.

74. Any person dissatisfied with an order or decision of the court or a single judge in any proceeding under this Act may, by leave of a judge of the court, appeal therefrom, if the question to be raised on the appeal involves future rights, or if the order or decision is likely to affect other cases of a simi-

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lar nature in the winding-up proceedings, or if the amount involved in the appeal exceeds five hundred dollars:

2. Such appeal shall lie,—

In Ontario, to the Court of Appeal for Ontario;

In Quebec, to the Court of Queen's Bench;

In any of the other Provinces, and in the North-West Territories, to the full court:

3. In the District of Keewatin any person dissatisfied with ^{In Keewatin.} an order or decision of the court or a single judge, in any proceeding under this Act, may, by leave of a judge of the Supreme Court of Canada, appeal therefrom to the Supreme Court of Canada:

4. All appeals shall be regulated, as far as possible, accord- ^{Practice.} ing to the practice in other cases of the court appealed to: but no such appeal shall be entertained unless the appellant has, ^{Security on appeal; and time for, limited.} within fourteen days from the rendering of the order or decision, or within such further time as the court appealed from allows, taken proceedings therein to perfect his appeal, nor unless, within the said time, he has made a deposit or given sufficient security, according to the practice of the court that he will duly prosecute the said appeal and pay such damages and costs as may be awarded to the respondent. 45 V., c. 20, s. 78, part, and s. 79;—49 V., c. 25, s. 16.

75. If the party appellant does not proceed with his appeal, ^{If not proceeded with appeal may be dismissed.} according to the law or the rules of practice, as the case may be, the court appealed to, on the application of the respondent, may dismiss the appeal, with or without costs. 45 V., c. 23, s. 80.

76. An appeal shall lie to the Supreme Court of Canada, ^{Further appeal to Supreme Court.} by leave of a judge of the said Supreme Court, from the judgment of the Court of Appeal for Ontario, the Court of Queen's Bench in Quebec, or the full court in any of the other Provinces or in the North-West Territories, as the case may be, if the amount in the appeal exceeds two thousand dollars. 45 V., c. 23, s. 78, part.

PROCEDURE.

77. The powers conferred by this Act upon the court may, ^{How the powers of the Court} subject to the appeal in this Act provided for, be exercised by

may be exercised.

In Ontario.

Orders of Court to be deemed judgments.

How to be executed.

Attachment and garnishment how effected.

Witnesses attendance how secured.

Persons having information may be examined.

a single judge thereof; and such powers may be exercised in chambers, either during term or in vacation :

2. In the Province of Ontario such powers may, subject to an appeal, according to the ordinary practice of the court, be exercised by the master, referee or other officer who, under the practice or procedure of the court, presides in chambers, or by the master in ordinary, or by any local master or referee. 45 V., c. 23, s. 77;—47 V., c. 39, s. 5.

78. Every order of the court or a judge for the payment of money or costs, charges or expenses made under this Act, shall be deemed a judgment of the court, and shall bind the lands, and may be enforced against the person or goods and chattels, lands and tenements of the person ordered to pay, in the same manner in which judgments or decrees of any superior court obtained in any suit may bind lands, or be enforced in the Province where the court enforcing the same is situate. 46 V., c. 23, s. 1.

79. Debts due to any person against whom such order for the payment of money, costs or expenses has been obtained, may be attached and garnished in the same manner as debts due to a judgment debtor may be attached and garnished by a judgment creditor in any Province where the attachment and garnishment of debts is allowed by law. 46 V., c. 23, s. 2.

80. In any action, suit, proceeding or contestation under this Act, the court may order the issue of a writ of *subpœna ad testificandum* or of *subpœna duces tecum*, commanding the attendance, as a witness, of any person who is within Canada. 45 V., c. 23, s. 81.

81. The court may, after it has made a winding-up order, summon before it or before any person named by it any officer of the company or person, known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the court deems capable of giving information concerning the trade, dealings, estate or effects of the company, and the court may require any such officer or person to produce any book, paper, deed, writing or other document in his custody or power relating to the company :

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reasonable sum for his expenses, refuses, without a lawful excuse, to attend at the time appointed, the court may cause such person to be apprehended and brought up for examination; but in cases in which any person claims any lien on papers, deeds, writings or documents produced by him, such production shall be without prejudice to such lien, and the court shall have jurisdiction in the winding up, to determine all questions relating to such lien. 45 V., c. 23, s. 82.

Proviso: as to question of lien on papers.

82. The court or the person so named may examine, upon oath, either by word of mouth or upon written interrogatories, any person appearing or brought up in manner aforesaid, concerning the affairs, dealings, estate or effects of the company, and may reduce in writing the answers of any such person, and require him to subscribe the same; and if such person, without lawful excuse, refuses to answer the questions put to him, he shall be liable to be punished as for contempt of court. 45 V., c. 23, s. 83.

Examination to be on oath.

Refusal to answer, to be contempt.

83. When in the course of the winding-up of the business of a company under this Act, it appears that the past or present director, manager, liquidator, receiver, employee or officer of such company has misapplied or retained in his own hands, or become liable or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust, in relation to the company, the court may, on the application of any liquidator, or of any creditor or contributory of the company, notwithstanding that the offence is one for which the offender is criminally liable, examine into the conduct of such director, manager, liquidator, receiver, officer or employee, and compel him to repay any moneys so misapplied or retained, or for which he has become liable or accountable, together with interest, at such rate as the court thinks just, or to contribute such sums of money to the assets of the company, by way of compensation in respect of such misapplication, retention, misfeasance or breach, of trust, as the court thinks fit. 45 V., c. 23, s. 84:—47 V., c. 39, s. 6.

Officer of company, &c., mis-applying money, may be compelled to repay.

84. The courts of the various Provinces, and the judges of the said courts respectively, shall be auxiliary to one another for the purposes of this Act; and the winding-up of the business of the company, or any matter or proceeding

Various provincial courts to be auxiliary to one another.

relating thereto, may be transferred from one court to another with the concurrence, or by the order or orders, of the two courts, or by an order of the Supreme Court of Canada. 45 V., c. 23, s. 86.

Order of one court may be enforced by another.

85. When any order made by one court is required to be enforced by another court, an office copy of the order so made, certified by the clerk or other proper officer of the court which made the same, and under the seal of such court, shall be produced to the proper officer of the court required to enforce the same, and the production of such copy shall be sufficient evidence of such order having been made; and thereupon such last mentioned court shall take such steps in the matter as are requisite for enforcing such order, in the same manner as if it was the order of the court enforcing the same. 45 V., c. 23, s. 87.

Rules of procedure and as to amendments to apply.

86. The rules of procedure, for the time being, as to amendments of pleadings and proceedings in the court, shall apply, as far as practicable, to all pleadings and proceedings under this Act; and any court before which such proceedings are being carried on shall have full power and authority to apply the appropriate rules as to amendments of the proceedings. 45 V., c. 23, s. 88, *part*.

No proceeding void for irregularity.

87. No pleading or proceeding shall be void by reason of any irregularity or default which may be amended or disregarded under the rules and practice of the court. 45 V., c. 23, s. 88, *part*.

Before whom affidavits may be made.

88. Every affidavit, affirmation or declaration required to be sworn or made under the provisions or for the purposes of this Act, or to be used in the court in any proceeding under this Act, may be sworn or made in Canada before a liquidator, judge, notary public, commissioner for taking affidavits or justice of the peace; and out of Canada, before any judge of a court of record, any commissioner for taking affidavits to be used in any court in Canada, any notary public, the chief municipal officer of any town or city, any British consul or vice-consul, or any person authorized by or under any Statute of Canada, or of any Province, to take affidavits. 45 V., c. 23, s. 89.

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89. All courts, judges, justices, commissioners and persons acting judicially shall take judicial notice of the seal, or stamp or signature, as the case may be, of any such court, judge, notary public, commissioner, justice, chief municipal officer, consul, vice-consul, liquidator or other person attached, appended or subscribed to any such affidavit, affirmation or declaration, or to any other document to be used for the purposes of this Act. 45 V., c. 23, s. 90.

Judicial notice
of seals, &c.

90. Any powers by this Act conferred on the court are in addition to, and not in restriction of any other power subsisting either at law or in equity, of instituting proceedings against any contributory, or the estate of any contributory, or against any debtor of the company, for the recovery of any call or other sums due from such contributory or debtor or his estate; and such proceedings may be instituted accordingly. 45 V., c. 23, s. 92.

Powers conferred on court
by this Act are
in addition to
the other
powers of
the court.

91. All costs, charges and expenses properly incurred in the winding-up of a company, including the remuneration of the liquidator, shall be payable out of the assets of the company in priority to all other claims. 45 V., c. 23, s. 93.

Costs payable
out of estate.

92. In Ontario, the judges of the High Court of Justice; in Quebec, the judges of the Court of Queen's Bench; and in the other Provinces the judges of the court, or a majority of the judges in each case, of whom the chief justice shall be one, from time to time may make and frame and settle the forms, rules and regulations to be followed and observed in proceedings under this Act, and may make rules as to the costs, fees and charges which shall or may be had, taken or paid in all such cases by or to attorneys, solicitors or counsel and by or to officers of courts, whether for the officers or for the Crown, and by or to sheriffs, or other persons, or for any service performed or work done under this Act. 45 V., c. 23, s. 97.

Judges may
make rules.

93. Until such forms, rules and regulations are made, the various forms and procedures, including the tariff of costs, fees and charges in cases under this Act, unless otherwise specially provided, shall, as nearly as may be, be the same as those of the court in other cases. 45 V., c. 23, s. 98.

Until rules are
made, present
procedures to
apply.

UNCLAIMED DIVIDENDS.

Unclaimed dividends to be paid to Receiver General.

94. All dividends deposited in a bank, and remaining unclaimed at the time of the final winding-up of the business of the company, shall be left for three years in the bank where they are deposited, subject to the claim of the person entitled thereto,—and if still unclaimed, shall then be paid over by such bank, with interest accrued thereon, to the Minister of Finance and Receiver General,—and, if afterwards duly claimed, shall be paid over to the persons entitled thereto. 45 V., c. 23, s. 91.

OFFENCES.

Any person
destroying, &c.,
books, &c., of
company guilty
of misdemeanor.

Any person destroying, &c., of books, &c., of company guilty of misdemeanor.

95. Every person who, with intent to defraud or deceive any person, destroys, mutilates, alters or falsifies any book, paper, writing or security, or makes or is privy to the making of any false or fraudulent entry in any register, book of account or other document belonging to the company, the business of which is being wound up under this Act, is guilty of a misdemeanor, and liable to imprisonment in the penitentiary for any term not less than two years, or to imprisonment in any gaol or place of confinement for any term less than two years, with or without hard labor. 45 V., c. 23, s. 85.

Court may direct criminal proceedings against officers of the company guilty of offences.

96. When a winding-up order is made, if it appears in the course of such winding-up that any past or present director, manager, officer or member of the company is guilty of any offence in relation to the company for which he is criminally liable, the court may, on the application of any person interested in such winding-up, or of its own motion, direct the liquidator to institute and conduct a prosecution or prosecutions for such offence, and may order the costs and expenses to be paid out of the assets of the company. 45 V., c. 23, s. 95.

PROVISIONS APPLICABLE TO BANKS.

**Provisions
applicable to
banks.**

97. The provisions of sections ninety-eight to one hundred and four, both inclusive, apply to banks only, not including savings banks. 45 V., c. 23, *sub-title*.

Provision as to winding-up order in case of bank.

98. In the case of a bank, the application for a winding-up order shall be made by a creditor for a sum of not less than one thousand dollars, and the court shall, before making the

order, direct a meeting of the shareholders of the bank and a meeting of the creditors of the bank to be summoned, held, and conducted as the court directs, for the purpose of ascertaining their respective wishes as to the appointment of liquidators. 47 V., c. 39, s. 7, *part*.

99. The court may appoint a person to act as chairman of the meeting of shareholders, and in default of such appointment, the president of the bank, or other person who usually presides at a meeting of shareholders, shall preside; the court may also appoint a person to act as chairman of the meeting of creditors, and in default of such appointment, the creditors shall appoint a chairman. 47 V., c. 39, s. 7, *part*. Chairman of meetings of shareholders and of creditors.

100. In taking a vote at such meeting of shareholders, regard shall be had to the number of votes conferred by law or by the regulations of the bank on each shareholder present or represented at such meeting; and in the case of creditors, regard shall be had to the amount of the debt due to each creditor. 47 V., c. 39, s. 7, *part*. Scale of votes.

101. The chairman of each meeting shall report the result thereof to the court, and if a winding-up order is made, the court shall appoint three liquidators, to be selected in its discretion, after such hearing of the parties as it deems expedient, from among the persons nominated by the majorities and minorities of the shareholders and creditors at such meetings respectively. 47 V., c. 39, s. 7, *part*. Chairman to report result of vote. Appointment of liquidators.

102. If no one has been so nominated, the three liquidators shall be chosen by the court, and if less than these have been nominated, the requisite additional liquidator or liquidators shall be chosen by the court. 45 V., c. 23, s. 103. If liquidators have not been nominated.

103. The liquidators shall ascertain as nearly as possible, the amount of notes of the bank intended for circulation and actually outstanding, and shall reserve, until the expiration of at least two years after the date of the winding-up order, or until the last dividend, if that is not made until after the expiration of the said time, dividends on such part of the said amount in respect of which claims are not filed; and if claims are not filed and dividends applied for in respect of any part of the said amount before the period herein limited, the divi- Reservation of dividends in respect to outstanding notes.

dends so reserved shall form the last or part of the last dividend. 45 V., c. 23, s. 104.

What is sufficient notice to holders of notes.

In Quebec.

104. Publication in the *Canada Gazette* and in the official *Gazette* of each Province of Canada, and in two newspapers issued at or nearest the place where the head office of a bank is situate, of notice of any proceeding of which, under this Act, creditors should be notified, shall be sufficient notice to holders of bank notes in circulation; and if the head office is situated in the Province of Quebec, one of the newspapers in which publication is to be made shall be a newspaper published in English and the other a newspaper published in French. (1) 45 V., c. 23, s. 105.

(1) The provisions of the following sections of the act are applicable to Insurance Companies only.

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CHAPTER VIII.

SHARES AND SHAREHOLDERS.

SECT. 1.—LIABILITY OF SHAREHOLDERS.

SECT. 2.—LIEN ON SHARES FOR HOLDER'S INDEBTEDNESS TO BANK.

SECT. 3.—TRANSFER AND TRANSMISSION OF SHARES.

SECT. 4.—RIGHTS OF SHAREHOLDERS TO DIVIDENDS, NEW SHARES, SURPLUS ASSETS ETC.

SECT. 1.—LIABILITY OF SHAREHOLDERS.

As a general rule any person whose name is registered on the stock-ledger of the Bank as a shareholder will be held liable as such. The records in this book are *prima facie* evidence of ownership (1)

Where directors, for the purpose of sustaining the credit of the Bank and without any ulterior motive beyond the corporate welfare, allow shares to be placed in their names simply as a cover, and because they believed that the same could not be properly purchased or owned by the Bank, they will be treated as owners so far as liability is concerned.

(2)

A *double liability* attaches to the subscription for shares in the capital stock of a banking corporation.

(1) Thornton v. Lane, 11 Ga. 459.

(2) Morse on Banks and Banking, p 496.

The *first* is for the full amount of the shares subscribed for; the *second*, for an additional like amount in the event of the property and assets of the Bank being insufficient to pay its debts and liabilities upon liquidation.

As a general rule the obligation of payment is created and perfected by the act itself of subscription. It would appear, however, that this act would not be considered as perfected unless a sum equal to at least ten per cent. on the amount subscribed for is actually paid in at the time of or within thirty days after the time of subscribing. Such, we apprehend, is the construction to be placed upon the proviso introduced into section twenty of the Bank Act. Shares otherwise will not be held to "have been lawfully subscribed for." This point, however, has never been adjudicated upon.

Where the act of subscription is thus perfected, the whole amount, in the absence of a proviso to the contrary, is payable in terms of the Act. A proviso may be inserted that it shall be demanded only in instalments of specified amounts, to be called for within longer periods, but no statement, however explicit, in the original contract of subscription can relieve the subscriber from the ultimate necessity of paying the full par value of the full number of shares subscribed for, and the double liability in addition, so long as any creditors of the corporation remain unpaid.

The doctrine that the stock subscriptions are in the nature of a trust fund for payment of corporate liabilities seems to be well established. From it results the principle that subscribers cannot avail themselves of the statute of limitations in bar of the claims of creditors to have full payment made. For the subscribers are chargeable with the trust, and though the corporation may never have seen fit to enforce it, yet the *cestuis* do not thereby lose their rights. (1) The collection in due season by the corporation is a matter lying wholly

(1) *Payne v. Bullard*, 23; Miss. 88; *King v. Elliott*, 5 Sm. & Mar. 447; *Arthur v. Commercial & R. R. Bank of Vicksburg*, 9 id. 430. Morse on Banks and Banking, p. 489, notes 1 and 2.

between itself and the subscribers. The neglect of the former cannot exonerate the latter from obligations which do not run alone to the corporate body for its sole benefit, but rather continue through it for the real and ultimate benefit of creditors. The corporation cannot stand between the real debtors and the real creditors, and by its laches, continued for several years, which under such circumstances would often be voluntary and culpable, save the former from a *bona fide* liability to the latter.

Whether the corporation itself, by neglecting for several years to call for any instalment, would thereby forfeit its right to demand further payment for any other purpose than that of meeting corporate debts which the corporate assets do not suffice to pay, is a question which has never been decided. (1)

The lapse of several years creates a natural presumption that the subscriptions have been paid in (2) and, therefore, one who held through *mesne* conveyances from an original subscriber, and had no personal knowledge of the fact that full payments had not been made, might have a reasonable and a sufficient claim to protection.

To the same doctrine of trust must be referred the further principle that a subscription for Bank stock cannot be diminished after once made. So soon as it is legally complete it is an obligation from which even the directors cannot grant the subscriber any absolution, either for the whole or for any part, which will avail him as against persons who are creditors of the corporation prior to the diminution. The directors do not represent these persons, and are unauthorized to discharge an indebtedness of which they are the real beneficiaries; though as towards subsequent creditors the proceedings may doubtless be perfectly valid, if not tainted in any respect with ill-faith. (3)

(1) But see *Georgia Manuf. & Paper Mill Co. v. Amis*, 53 Ga. 228.

(2) *Agricultural Bank v. Burr*, 23 Me. 256.

(3) *Payne v. Bullard*, 23 Miss. 88; *Penobscot & Kennebec R. R. Co. v. Dunn*, 36 Me. 501; *Mann v. Pentz*, 2 Sandf. Ch. 257.

After shares have been issued, the owner, of course, has the ordinary power to sell and transfer them (1) equally, whether the whole price or only an instalment has been paid up, unless the by-laws declare otherwise. But before this stage has been reached, while his position is simply that of a subscriber, his privilege of transfer exists in deed, but is subject to the restriction that it will not be valid so far as to relieve him from his liability upon the unpaid balance of his subscription, unless it is assented to by the corporation, and his assignee is accepted, either directly or by sufficient implication in his place. After such acceptance the assignor is fully relieved and exonerated from all liability on his subscription and the assignee, by virtue of the same act, succeeds in every respect to all the liabilities, rights, privileges and disabilities of his assignor. After an issue of shares the shareholder is an owner of assignable personal property, before the issue he is only a party to a contract in which his interest can be divested only with the consent of the second contractor.

The liability of a shareholder for an amount over and above any sum not paid up on his shares, equal to the par value of such shares, does not accrue, unless the property and assets of the Bank are insufficient to pay its debts and liabilities. (2)

A bill will lie in equity at the suit of a creditor, to enforce the double liability of the shareholders of an insolvent Bank; but such bill must be on behalf of all the creditors. (3)

If a shareholder has transferred his shares under circumstances which do not, by law, free him from liability in respect thereof (4), or if he is by law liable to the company or its members or creditors, as the case may be, to an amount beyond the amount unpaid on his shares, he will be deemed a member of the company for the purposes of this Act, and will be liable to contribute, as aforesaid, to the extent of his

(1) Section 29; *Smith v. Bank of Nova Scotia*, 8 S. C. R. 558.

(2) Section 70.

(3) *Brooke v. Bank of U. C.* 16 Chy. 249, 17 Chy. 301.

(4) See Section 77.

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liabilities to the company or its members or creditors, independently of this Act; and the amount which he is so liable to contribute will be deemed an asset and a debt as aforesaid. (1)

The liability of any person to contribute to the assets of a company under the Act, in the event of the business of the same being wound up, will create a debt accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made, as hereinafter mentioned, for enforcing such liability; and in the case of the bankruptcy or insolvency of any contributory, the estimated value of his liability to future calls, as well as calls already made, may be proved against his estate. (2)

As a general rule after a company has been organized under charter, the legislature has no power to create by subsequent enactment any personal liability on the part of the shareholders, in excess of the amount provided for in the charter. But where, as in the present Act (3), provision is made for future legislation by way of amendment in the public interest of any of the provisions in the Act contained, this rule does not apply. The legislature may therefore, if it deem the measure advisable, provide for an unlimited liability on the part of shareholders.

Although, as we have seen, a shareholder cannot in general claim prescription when payment is sought to be enforced, for any unpaid balance on his original subscription, it is apprehended that this liability, and the further liability for an amount equal to his original subscription, would come under the operation of the statute of limitations once the Bank passed into the hands of liquidators. If this is so the time when the statute begins to run is, we apprehend, a question not difficult of solution.

By the Winding-up Act the liability creates a debt accruing due at the time when the liability commenced but

(1) Section 45, Winding-up Act.

(2) Section 46, do.

(3) Section 85.

payable at the time or respective times when calls are made for enforcing such liability. (1) It is further enacted (2) that no call shall compel payment of a debt before the maturity of such call. From this it follows that the liability for contribution matures on the several days fixed for payment of the calls, and the statute of limitations will commence to run for each call from the maturity thereof as aforesaid. The liability accrues not upon the suspension of the Bank, but upon the discovery of the insufficiency of the assets to pay the corporate indebtedness, and this discovery is evidenced by the demand for contribution payable on a fixed day.

CALLS.

The shares of the capital stock of the Bank when not fully paid up must be paid in by such instalments, and at such times and places as the directors appoint (3); and the directors are authorized to make such calls for money from the several shareholders for the time being, upon the shares subscribed for by them, respectively, as they find necessary. (4)

No call exceeding ten per cent. of the par value of each share can be made (5); and there must be an interval of not less than thirty days between the making of two successive calls, as well as an interval of at least thirty days between the time of making a call, and the time fixed for payment thereof. (6)

Where one call could not be enforced for want of sufficient notice, it does not vitiate other calls in the same notice, where the full time was given. (7)

A call made by four directors, one of whom was not legally appointed, was held valid, three of the directors who made

(1) Section 46, *Ante*, CHAP. VII.

(2) Section 49.

(3) Section 20.

(4) Section 21.

(5) Section 21, sub-section 2.

(6) *Robertson v. La Banque d'Hochelaga*, 4 L. N. 314, 6 L. N. 307. See also *St. John Bridge Co. v. Woodward*, 1 Kerr, 29.

(7) *St. John Bridge Co. v. Woodward*, 1 Kerr, 29.

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it being duly qualified, and that number being a sufficient quorum under section 16. (1) It is also laid down in the text books generally that where the power to make calls is vested in the directors, a call made by those who are actually directors and not yet removed, even though illegally elected, will be good. (2) It would seem, however, from a recent decision of the Privy Council that to justify a forfeiture for non-payment of calls, the calls must have been regularly made by a board of directors who had been duly elected, and this case seems to throw doubt on the validity of calls made by a *de facto* board of directors. (3)

If any suspension of payment in full in specie or Dominion notes, of all or any of the notes or other liabilities of the Bank, continues for six months, and if no proceedings are taken, under any general or special act for the winding up of the Bank, the directors are required to make calls on all shareholders, to the amount they deem necessary to pay all the debts and liabilities of the Bank, without waiting for the collection of any debts due to it or the sale of any of its assets or property.

Such calls are to be made at intervals of thirty days, and upon notice to be given thirty days at least prior to the day on which such calls shall be payable, and any number of such calls may be made by one resolution; any such call shall not exceed twenty per cent. on each share; and payment of such calls may be enforced in like manner as payment of calls on unpaid stock may be enforced; and the first of such calls may be made within ten days after the expiration of the said six months.

Every director who refuses to make or enforce, or to concur in making or enforcing, any call under this section, will be guilty of a misdemeanor, and liable to imprisonment for

(1) *Bank of Liverpool v. Bigelow*, 3 R. & Co. 236, Nova Scotia.

(2) *Bruce on Ultra Vires*, 2nd ed. 362.

(3) *The Garden Gully United Quartz Mining Co. v. McLister*, L. R. 1 App. Cas. 39 (1875). See also *Bottomley's Case*, 16 Ch. Div. 681 (1880).

any term not exceeding two years, and will further be personally responsible for any damages suffered by such default. (1)

In the event, however, of proceedings being taken under any general or special winding-up Act, in consequence of the insolvency of the Bank, all calls must be made in the manner prescribed for the making of such calls in such general or special winding-up Act. (2)

A joint stock company may take a promissory note from a shareholder for an amount due by him on an assessment of his stock, there being nothing in the Act of incorporation to prohibit it. (3)

In the event of non-payment of any call made by the directors an action may be at once brought in the corporate name of the Bank to recover and get in all moneys due on such call. (4) But the enforcing of payment in this manner is not the only remedy given by the Act to the Bank, for it is further provided that the directors have it in their option to declare such shares forfeited to the Bank (5), and they are empowered to sell, at public auction, on giving thirty days prior public notice, the said shares or so many of them as shall, after deducting the reasonable expenses of the sale, yield a sum of money sufficient to pay the unpaid instalment due and an additional sum, by way of forfeiture, of ten per cent. on each share upon which the instalment is due.

Where the directors elect to sue for non-payment of calls, in virtue of the provisions of the Act, and notify defendant of their election, they cannot afterwards alter their election and proceed to confiscate the shares without first giving the owner notice, and putting him *en demeure*. (6)

(1) Section 72.

(2) Section 73. See also *ante* CHAP. VII.

(3) *St. Stephen's Branch Ry. Co. v. Black*, 2 Han. 137.

(4) Section 22.

(5) Sections 22 and 23.

(6) *Robertson v. La Banque d'Hochelaga*, 4 L. N. 314; 6 L. N. 307.

SECT. 2. LIEN ON SHARES FOR HOLDERS INDEBTEDNESS TO BANK.

Section fifty-nine provides that the Bank shall have a privileged lien for any debt or liability for any debt to the Bank, on the shares and unpaid dividends of the debtor or party so liable, and may decline to allow any transfer of the shares of such debtor or party until such debt is paid ; and, further, that if such debt is not paid when due, the Bank may sell such shares after due notice, given to the holder thereof, of the intention of the Bank to sell the same. Should the value of the shares at the then current rate exceed the amount of the debt, it is apprehended that the debtor is entitled to demand an apportionment, and that the more general terms of this section are to be considered as modified by the provisions of the twenty-ninth section of this Act. This latter section has declared as follows : " No assignment or transfer shall be valid until the person or persons making the same shall, if required by the Bank, previously discharge all his, her or their debts or liabilities to the Bank, which may exceed in amount the *remaining* stock, if any, belonging to such person or persons valued at the then current rate ; and no fractional part or parts of a share, or less than a whole share, shall be assignable or transferable."

No lien exists at common-law upon the shares of a shareholder who is indebted to the Bank. But the importance of such a provision has caused it to be thus established by legislative enactment. The lien which exists upon unpaid dividends may be said to partake more of the nature of a set-off than of a lien proper, and might with more exactness be so termed. Inasmuch as a dividend is a simple debt owing from the corporation to the shareholder, and as such recoverable by action, the Bank has always the right to offset such dividend against any indebtedness to the Bank, and this, too, though the dividend have been substantially earned before the indebtedness accrued.

FOR WHAT INDEBTEDNESS THE LIEN ATTACHES.

The nature of the indebtedness, whence or how arising, is a matter of no consequence as regards the attaching of the lien. Nor is it of any moment whether or not the indebtedness has actually matured at the time when a demand for transfer is made. It now attaches in like manner to secure liability for debt. Such was not the case, however, before the amendment of 1880 came into force. And certainly it seems reasonable that the lien should secure indebtedness which has not fully matured; otherwise a large portion of the good which is sought to be accomplished by it must be wholly annulled. The Bank, knowing itself to be entitled to such a lien, may fairly be supposed to rely upon it in allowing the indebtedness to be assumed originally, and would be justified in regarding it as a valuable contribution towards perfect security, on the faith of which the directors may not improperly neglect to demand such strong additional safeguards as they are wont. Further if the lien did not apply to immature indebtedness, what is to prevent the grossest frauds by the debtor? He could not be legally opposed, if with the express purpose of stripping the Bank of all possible means of repaying itself, and knowing that he will not and cannot himself pay it, he transfers all his shares upon the very day before his note to the Bank is to fall due.

It does not prevent the lien from attaching, or the Bank from refusing, to permit a transfer, that the deposit account of the debtor is greater than the amount of his indebtedness. The Bank is under no obligation to look to the deposit account before or in preference to the stock. And even if the shareholder offer ample security for the debt, and the Bank still refuse to permit the transfer, the shareholder may not have a right of action against the Bank for the refusal. There seems to be some reason for doubting by what right the courts could compel the Bank to exchange, or punish it for refusing to exchange, a security of a peculiar nature, which the law has directly given to it, and to take in its stead

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another species of security which, though it may appear equally valuable and sufficient, may yet for divers reason be less acceptable to the directors. (1) But if the Bank assents to accept other security, the lien will be thereby discharged, unless the contrary understanding be affirmatively proved.

WAIVER AND LOSS OF LIEN.

If the Bank suffers the transfer to be made upon its books, without the express stipulation that the shares shall still be held by the assignee subject to the lien for the then subsisting indebtedness of the assignor, it will amount to a waiver of the lien. (2) But the Bank may at any time demand and receive further security from any indorser or guarantor for the shareholder's indebtedness without in any way infringing or affecting its right of lien. (3)

The lien is appurtenant to the indebtedness and not to the remedy. Whence it follows that though the right of action at law may have been barred, and the remedy lost by the running of the statute of limitations, still, the indebtedness not being thereby discharged, the lien subsists. The two are co-existent. (4)

SUBROGATION OF SURETIES TO BANK'S LIEN.

The lien is primarily for the benefit of the Bank. But if the principal debtor furnishes sureties or guarantors upon the debt, and they pay the amount to the Bank, they will then be subrogated to all the rights of the Bank. (5) They will be entitled to avail themselves of the lien, and the Bank will owe to them the duty of refusing to allow a transfer of the shares, and must not suffer a waiver or loss of the security by any other means, until they have been reimbursed.

(1) But see *Mechanics Bank v. Earp*, 4 Rawle, 384.

(2) *Sewall v. Lancaster Bank*, 17 Serg. & R. 285; *Rogers v. Huntingdon Bank*, 12 id. 77.

(3) *Union Bank v. Laird*, 2 Wheat. 390.

(4) *Farmers Bank v. Iglehart*, 6 Gill, 50.

(5) Art. 1950, C. C. L. C.



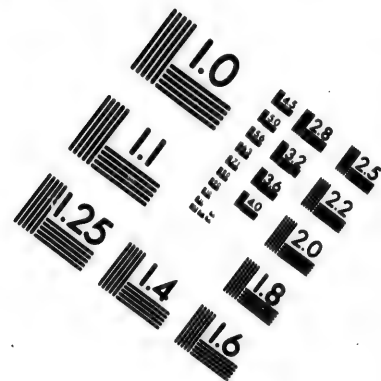
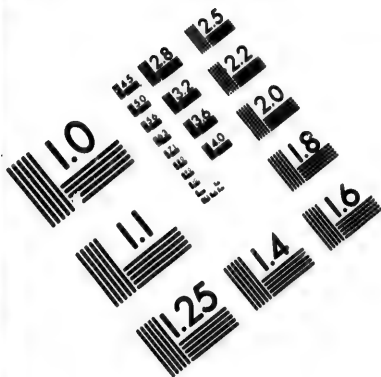
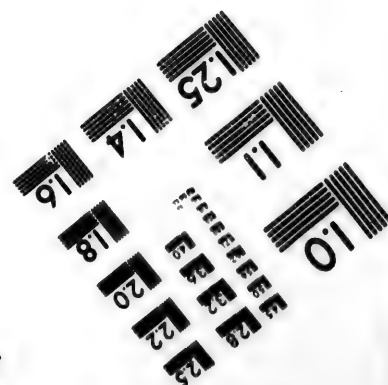
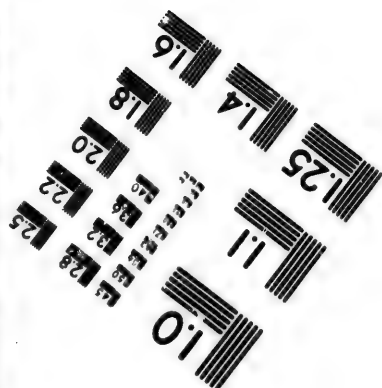
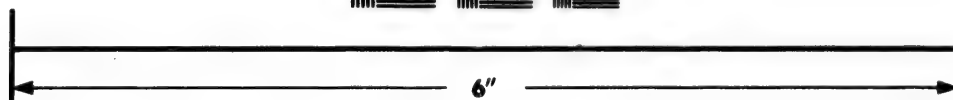
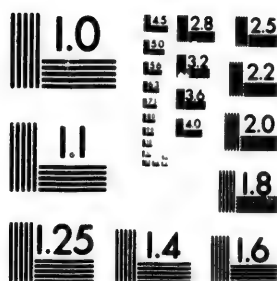


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After payment by them, the Bank in fact becomes a trustee for them, for the purpose of doing whatever may be necessary to retain and secure the lien for their benefit. (1) The rule that the surety is entitled to the benefit of all the creditor's securities has been carried so far in respect to liens upon Bank shares, that it has been held that the Bank has no right to appropriate or shift the lien for the purpose of covering a new demand, with the effect of leaving the debt on which the surety is liable either unsecured or imperfectly secured (2)

It being a recognized principle of law that the obligation of a surety is at an end, when by the act of the creditor the surety can no longer be subrogated in the rights, hypothecs and privileges of such creditor (3), it follows that all sureties and guarantors of the shareholder's indebtedness to the Bank will be discharged by any waiver of its lien.

SECT. 3. TRANSFER AND TRANSMISSION OF SHARES.

Every person, who becomes the owner of shares, is entitled to demand that the Bank shall permit the necessary formalities, accompanying and requisite to the completion of a transfer, to be performed on its books, and it shall issue to him a certificate for the shares, such being the ordinary usage of business in this respect. (4) An action will lie for a wrongful refusal to comply with these obligations. (5) Though if the Bank has any lien upon the shares, or if the party himself or the seller of the shares fail to conform to the requisite and reasonable formalities established by the Bank in the matter of transfer, the Bank will be entitled to refuse to act until the obstacle is removed. Statutory provisions declaring the shares to be transferable at the Bank, or

(1) *Klopp v. Lebanon Bank*, 46 Penn. St. 88.

(2) *Kuhns v. Westmoreland Bank*, 2 Watts, 136.

(3) Art. 1959, C. C. L. C.

(4) *Hussey v. Manufacturer's Bank*, 10 Pick. 415.

(5) *Morgan v. Bank of North America*, 8 Serg. & R. 73.

that the transfer shall be registered on the books of the Bank, are designed for the protection of the Bank, and will be so construed as to secure that protection. The transfer will not be considered as having been made "at the Bank," simply because the parties have passed and received the certificate within the walls of the banking house. The act must be so done as to assume a formal and authentic shape, under the official cognizance of the officers of the institution. The regulations of the corporation in the premises, unless unreasonable, must be complied with.

Section 29 of the Act contains the provision that the directors have power to regulate transfers of stock, with regard at least to the place or places where any transfer is to be made and to the form which such transfer will take. It is especially provided by the Act itself that no assignment or transfer shall be valid, unless it is made and registered and accepted by the person to whom the transfer is made in a book or books kept by the directors for that purpose. The directors may also require that the person making any transfer of stock shall have previously discharged all his debts or liabilities to the Bank, which exceed in amount the remaining stock, if any, belonging to such person valued at the then current rate.

At common law an incorporated Bank has no implied lien upon the stock of a shareholder which has been transferred by him as security for any demand against him, and the Bank is under obligation, notwithstanding it may have any such demand to enter on its books the transfer of such stock in pursuance of the assignment of the same, and becomes liable in damages to the assignees for a refusal so to do.

This rule, however, does not of course hold, if by the charter of the Bank it is provided that all debts due the Company from a shareholder must be satisfied before any transfer of his stock shall be made. Such is the provision of

the Bank Act. In the case of the Union Bank *versus* Laird, it appeared that by the Act of incorporation the shares of a stockholder were transferable only on the books of the Bank, and that all debts due and payable to the Bank by a stockholder must be satisfied before the transfer shall be made, unless the president and directors should direct to the contrary. It was held by the Supreme Court of the United States that no person could acquire a legal title to any shares, except under a regular transfer according to the rules of the Bank, and that if any person took an equitable assignment it must be subject to the rights of the Bank under the Act of incorporation of which he was bound to take notice. As a creditor may take and hold several securities for the same debt from his joint debtors, and cannot be compelled to yield up either until the debt is paid, it was therefore further held that the Bank had a right to take security from one of the parties to a bill or note, and also to hold the shares of another party as security for the same.

When an intending purchaser of stock enquired of the Bank officers what claims the Bank held against such stock, and certain information was given, but before the arrangement for the transfer of the stock was completed another claim, which was then current in one of the other agencies of the Bank, was returned unpaid, it was held that the Bank, had a right to retain its lien on the stock for the additional sum before allowing the transfer of the stock in its books. (1)

The cashier properly makes or superintends the transfer of shares. Any person showing, *prima facie*, a legal right to demand a transfer to himself may demand it from the cashier or any other principal officer left in general charge and superintendence of the business of the Bank. Any officer, who can properly make the transfer at all, will be protected in making it without going behind the apparent legality and propriety of the demandant's right in order to determine whether or

(1) Cook V. Royal Canadian Bank, 20 Chy., 1 (1873),

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not there is any hidden cause for objecting to it. A *prima facie* title is enough, as if one who had bought shares sold by the sheriff asks for a transfer of them, the cashier is not only justified in giving it, but it is even his duty to do so, and the Bank cannot subsequently be held liable on the ground of any original irregularity, which should have altogether prevented the making of the sale.

It is an incumbent duty on the part of the Bank not to permit a transfer of stock until it is satisfied of a party's authority to transfer. If stock be transferred under a forged power of attorney, the real proprietor is entitled to have it replaced by the Bank, and also to the dividends due thereon. This point was determined in a case in which the Bank of England was defendant, and the Court laid down the broad principle, that transferable shares of the stock of any company could not be divested out of the proprietor by any act of the Company without the authority of the stockholder, and that a transfer in writing, not made by the party transferring or by some agent duly authorized, could have no effect.

J. L. made in favor of his son, a boy of about seven years of age, a document purporting to be a transfer of ten shares of bank stock; the document, which was regularly entered on the Bank's books, was in substance as follows: This indenture made the 7th of June 1875, between J. L. of the first part, and J. L. in trust for his son P. L. of the second part, and the Union Bank of the third part, witnesseth that for value received the party of the first part doth by these presents sell and assign to the said party of the second part ten shares of the capital stock of the Union Bank. And whereas the said party of the second part hath, with the approval of the Board of Directors of the said Bank, become the purchaser of the said ten shares," etc. Then followed a covenant on the part of the purchaser to observe all his obligations under the by-laws of the Bank, and the deed was signed by "J. L.; J. L. in trust for son P. L.; for the Union Bank,

J. J. L., assistant cashier." Two dividends were paid to J. L. in trust for his son, and the Bank then refusing to pay further, the plaintiff was appointed tutor to the minor, and brought suit to be declared proprietor of the said shares—*Held*, that the transfer or donation so attempted to be made was null and void for want of legal acceptance. (1)

The mere fact that a Bank permits stock which stood in the name of the testator to be transferred by the executor furnishes no ground of complaint against the Bank, although it is made to appear that the executor was by the act of transfer converting the money to his own use; for a party dealing with an executor is not bound to enquire into his object, nor is at all liable for the executor's misapplication of the money. The party dealing with an executor must have reasonable ground for believing that the executor intended to misapply the money.

For the daily inspection of the shareholders of the Bank a list of all transfers of shares is required to be made up at the end of each day, showing the parties to such transfers and the number of shares transferred in each case, and this list must be kept at the chief place of business of the Bank. Offices for the transfer of shares and the payment of dividends may be open in the United Kingdom under such agents, and according to such rules and regulations and after such forms as the directors may appoint.

SHARES PERSONAL ESTATE.

The provision of section 29 that the shares of the capital stock shall be deemed personal estate is merely declaratory of what the law would be, without special enactment to that effect. As personal estate of the holder they are liable to

(1) *Walsh v. Union Bank*, Q. 4 June 1880. Confirmed in Appeal.

bona fide creditors for debts incurred, and may be attached, seized and sold under writs of execution in like manner as other personal property may be so seized and sold. (1) A share, however, may be defined to be a right to partake according to the nominal value of said share of the surplus profits obtained from the use and disposal of the capital stock of the Bank to those purposes for which the Bank was instituted. They are not therefore strictly speaking chattels, and it has been considered that they bear a greater resemblance to *choses in action*, or in other words they are merely evidence of property. They are, it is held, mere demands for dividends as they become due, and differ from moveable property which is capable of possession and manual apprehension.

In fine Bank stock is individual interest in the dividends as they are declared, and a right to a *pro rata* distribution of the effects of the Bank on hand at the expiration of the charter; and the Capital Stock of the Bank is the whole individual fund paid in by the stockholders, the legal right to which is vested in the corporation to be used and managed in trust for the benefit of the members.

HOW FAR SHARES ARE GOODS, WARES AND MERCHANDISE.

It was for some time a matter of doubt in England whether shares in an incorporated company were of the nature of goods, wares, and merchandise within the statute of frauds, so as to require an agreement for a transfer of them to be in writing, etc. It is now, however, well settled that shares are not goods, wares, and merchandise within the statute of frauds, and that therefore a contract relating to a sale and transfer of them need not be in writing. In the United States, however, a different opinion seems to be held, and contracts for the sale of shares are not valid unless there has been a note or memorandum in writing or earnest or part payment.

(1) In Quebec, Bank shares cannot be seized by *saisie arret*, *Hudon et al v. Painchaud*, Ramsay's App. Cases.

SECT. 4—SHAREHOLDER'S RIGHT TO SURPLUS ASSETS.

Any surplus, which may remain, after payment of corporate debts, in the hands of the liquidators who have had the corporate property committed to them for the purpose of winding it up belongs to the shareholders. They are entitled to have it apportioned among them according to the number of their respective shares, and this will be done by order of the court, who will adjust the rights of the contributories among themselves. (1) The trust is first for the discharge of the indebtedness of the Bank, and next for a division of the remaining assets among the corporators. For this reason, and also because of the number of persons interested, a bill in equity may properly be brought against the trustee, demanding that he account, and that he collect and distribute the surplus property. Though if it should happen that an apportionment has already been made, and that only payment in accordance with it is sought, then each individual shareholder might maintain his own action at law for the collection of the sum due to him, like any other action for simple debt, (2) But the ownership of shares, or the payment of a contributory share under the apportionment for the payment of corporate debts, does not render the shareholder a creditor of the corporation, or entitled to any dividend out of its assets till all the proper indebtedness has been discharged in full. (3) Not even if the shareholders have been assessed upon the basis of an undervaluation of the corporate assets can they have any dividend returned to them so long as there are creditors of the corporation remaining unpaid. (4)

A failure on the part of any shareholder liable to any call to pay the same when due will operate a forfeiture

(1) See Section 51, Winding-up Act. *post*.

(2) *Bacon v. Robertson*, 18 How. U. S. 480; *Smith v. Snow*, 3 Mad. C. C. 310.

(3) *Hollister v. Hollister Bank*, 2 Keyes (N. Y.), 245; *Coulter v. Robertson* 24 Miss. 278.

(4) *Pruyn v. Van Allen*, 39 Barb. 354.

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by such shareholder, of all claim in or to any part of the assets of the Bank,—such call, and any further call thereafter, being nevertheless recoverable from him as if no such forfeiture had been incurred. (1)

SHAREHOLDER'S RIGHT TO NEW SHARES.

Where there is an increase of the original amount of the capital stock of the Bank, and new shares are created to represent it, those who are shareholders at the time of the creation have the first right to subscribe, in the proportion of their original shares, for the new ones, before these can be offered generally. (2) Nor can they be deprived of this right by the board of directors; but, if they be deprived of the privilege by the action of the board, they or any of them may sue the corporation by special count in assumpsit, and recover, by way of damages, any premium the shares might be worth above par. (3) But where the full amount of the original capital stock has never been subscribed for, and the full number of shares thereof has never been issued, the case is different. If the directors then see fit to accept or solicit subscriptions for the shares remaining untaken, they are not obliged to give to those who are already shareholders any preference, but may offer the fresh shares in open market. (4)

SHAREHOLDER'S RIGHT TO DIVIDENDS.

Dividends are only payable to the shareholder on demand; and accordingly he has no right of action against the Bank to recover them until after demand has been made for them, and made for them at a time when the shareholder has a right to have them paid. If he make the demand when the Bank is rightfully retaining the dividend in set-off against his indebtedness to the Bank, he cannot bring suit, after this indebtedness has been paid, without renewing the demand. (5)

(1) Section 74.

(2) *Gray v. Portland Bank*, 3 Mass. 364.

(3) *Eidman v. Howman*, 58 Ill. 444.

(4) *Curry v. Scott*, 54 Penn. St. 270.

(5) *Hagar v. Union Bank*, 63 Me. 509.

CHAPTER IX.

OF COLLECTIONS.

SECT. I.—OF THE POWER GENERALLY.

Collection upon checks, notes, drafts, bills of exchange, and in short upon every species of business paper, is a duty very commonly undertaken by banks on behalf of their customers. Collection upon checks is probably a universal necessity of the business. Specific power to assume this duty is not usually conferred in the charter of a banking corporation. It is not necessary that it should be so, since the courts regard it as a part of the banking business. (1) After the collection has been made the Bank becomes a simple contract debtor for the amount, less the commission. If the party for whom the collection is made is a regular depositor, the sum will be properly placed to his credit upon his general deposit account, (2) unless a peculiar usage or special instructions demand some different course of dealing. If the party has no deposit account the Bank simply owes him the amount on demand. But it would seem that, if it chooses, the bank may credit him with it as if it were an ordinary payment on deposit, and thus initiate and establish the relation of banker and depositor between itself and him. For though this may operate to place the Bank under obligations and duties towards him which would not otherwise have existed, yet these are all for his advan-

(1) *Tyson v. State Bank*, 6 Blackf. 225.

(2) *Marine Bank v. Rushmore*, 28 Ill. 463

tage, and his own right to withdraw the whole sum instantly upon demand is in no respect altered, if he does not wish to ratify the option of the Bank and to become an ordinary depositor. (1)

A Bank receiving paper for collection is generally the agent of the party from whom it receives it; (2) sometimes of the real owner, if he stands further removed in the chain of title. But in no case and in no sense is it the agent or trustee for the maker of the paper, or for the party who is indebted thereon. If the debtor simply pays into the Bank the amount due and takes up his paper, he is thereby fully acquitted and absolved. He is not responsible for the subsequent fate of the sum, and is not bound to inquire whether it comes to the hands of the person entitled to it, or is lost, wasted, or embezzled in the Bank. As he is under no liability of this description, so it follows that he has no right of action against the Bank if it fails to pay over properly. The whole business is completed, so far as he is concerned, by his payment and the contemporaneous surrender, cancellation, or destruction of the evidence of his debt. (3)

A note given in charge to a Bank for collection, and so indorsed as to place the apparent and technical title in the Bank, if not withdrawn after non-payment and protest, may be sued upon by the Bank in its own name. But unless specially so instructed it is not the duty of the Bank to bring suit under such circumstances. It would seem therefore that its doing so will be purely a gratuitous undertaking upon its part, for which it might perhaps be allowed its actual and necessary disbursements, but certainly nothing more in the way of compensation for its trouble in attending to the proceedings. (4)

(1) *Tinkham v. Hayworth*, 31 Ill. 519.

(2) *Daly v. Butchers' and Drovers' Bank of St. Louis*, 55 Mo. 94.

(3) *Smith v. Essex County Bank*, 22 Barb. 627.

(4) *Sterling v. Marietta & Susquehanna Trading Co.*, 11 Serg. & R. 179.

BUSINESS PAPER MADE PAYABLE AT BANK.

If a note, bond, or other instrument be made payable at a bank, and be deposited in that Bank for collection, the Bank becomes the agent of the payee to receive the money. But if it be not deposited in the Bank and the debtor deposits money there to meet it, then the Bank is the agent of the debtor. By making such deposit in due season, the debtor so far fulfils his duty that if the obligation be not presented there for payment at the day of its maturity, the debtor is liable for no loss or damage which may subsequently accrue either in the way of interest or costs of suits by reason of the delay. (1) Apparently, too, he should be acquitted if subsequently and before demand by the holder of the paper the Bank should fail.

NOTICE OF DISHONOR.

Where a Bank, not upon its own account but as agent for collection, holds indorsed paper of any description which is dishonored, it has been questioned to whom it is bound to give notice of the dishonor,—whether only to its own principal, that is to say, the party from whom it received the paper, or to the makers and all the indorsers thereon. The decisions, in American courts have not from the outset been perfectly harmonious. But the doctrine that the duty extends to the notification of any persons behind the party recognized by the Bank as its immediate principal is comparatively weakly supported.

According to Mr. Morse (2) it may be assumed now to be the law in the United States that the notification to the principal—*i. e.*, to the immediate predecessor in possession, the party from whom the Bank receives, no matter what may be the nature of the title or interest of that party to or in the paper—is sufficient to acquit the Bank. But though this is settled as

(1) *Ward v. Smith*, 7 Wall. 447; *Mount v. Dunn*, 4 L. C. R. 348.

(2) *Morse on Bank and Banking*, 400-402.

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the general rule, it is of course open to material variation from extrinsic causes. A special agreement, express or implied, between the Bank and its principal, may require notice to be given to all the parties, or to any particular party, on the paper. So a local usage, or the usage of the collecting Bank, to notify indorsers or makers, may render it obligatory upon the Bank to do so, as a part of the contract of collection.

It seems hardly necessary to state that which is the natural and necessary inference from the doctrines and cases already given, viz., that if any breach or neglect on the part of the Bank occurring in any portion of its duty in the task of collection results in any loss to any party interested in the paper, whether his name appears thereon or not, (1) such party will have his right of action against the Bank to recover reimbursement or damages for the injury. The measure of damages will be the amount of actual loss which he has sustained. (2)

It has been held also that where a Bank demands and receives payment of a dishonored note from an indorser, and he, seeking in his turn to recover from a prior indorser, fails to do so by reason of a default by the Bank in not making a proper demand upon the maker, which insufficiency was unknown to the paying indorser when he made the payment, he shall recover back the amount of his payment from the Bank.

DUTY OF BANK TO HOLDER OF PAPER LEFT ON COLLECTION.

The duty of the Bank to the holder of the paper which is received for collection differs slightly according to the character of the paper and the place where it is made payable. First in order will be considered those collections which are to be made in the same place where the collecting Bank itself

(1) *McKinster v. Bank of Utica*, 9 Wend. 46; 11 id. 473. *Browne et al v. Commercial Bank*, 10 Q. B. (U. C. 129.)

(2) *Bank of Washington v. Triplett*, 1 Pet. 25; *McKinster v. Bank of Utica*, 9 Wend. 46; *Tyson v. State Bank*, 6 Blackf. 225.

is situated. For the purpose of this discussion it makes no difference whether the Bank is itself the owner; or has come by the paper directly from the hands of the owner or his agent; or has received it from a correspondent of its own in some distant place. The only conditions are that the Bank performing the actual collection be situated in the same town where is also the person who is bound to make the payment, or the banking house at which, by the terms of the instrument, payment is to be made.

Where the instrument received for collection is a promissory note, a bill of exchange or a draft, the duty of the collecting Bank is comparatively simple. It must perform the ordinary requirements in the way of presenting for acceptance if the instrument ought to be accepted, and of presenting for payment at maturity when such presentment is necessary. But the Bank is not liable for neglecting to present a draft, where presentment is not necessary for charging any of the parties, and must therefore be legally useless even if made. If either acceptance or payment is refused, the paper must be sent to a notary for protest, provided there is any occasion for having it protested at all. And the Bank is liable if, through an erroneous opinion as to the legal character of any especial piece of business paper, though in an unusual form, it does not cause presentment, demand, and protest to be made in the manner which the court holds to be necessary. Though if the person from whom the Bank received the paper is immediately accessible, there seems to be no reason why the Bank should not be allowed at once to return the paper to him and leave him to have it protested, if he sees fit. But in such case it is essential that the return can be, and in fact is, accomplished with sufficient despatch to leave him reasonable time for attending to the protesting before it is too late to secure its advantages.

Where the instrument received for collection is a check, the duties of the Bank become somewhat more complicated,

at the same time that a more correct understanding of them is rendered vastly more important by reason of the immense amount of business of this description which all Banks are obliged to transact. Every Bank of deposit in the country is wont daily to receive from its customers upon deposit for their credit great numbers of checks drawn upon other Banks; though it will be remembered that the present discussion is confined to those cases where the drawee Banks are in the same city or town as as the receiving Bank. Whenever a check is deposited and credit therefor is given in the depositor's account, the check is taken, in the absence of any special agreement, for collection by the Bank as agent for the depositor; it is not taken as cash. It follows that the memorandum of credit may subsequently be cancelled if the collection should not be accomplished in due course (1). If circumstances should cause the obligation in any particular transaction to run to any person or party other than the one from whom the Bank receives the check, the nature of the obligation is not thereby substantially affected, certainly it can never be increased. The duty of the Bank is still precisely the same duty, though it may prove that a true owner, not at first known to the Bank, is the party who is really entitled to claim a performance of that duty, or damages for its breach. For the sake of brevity we will hereafter designate the person, whoever he may be, to whom the obligation of the Bank runs, as the depositor or the customer. It is necessary in the outset thoroughly to disembarass the relation of the Bank to the customer, and consequently the whole matter of the duties and liabilities of the Bank in the premises, from two wholly distinct and alien subjects, to wit: The relation of the payee, owner, or holder of the paper to the maker, drawer or acceptor thereof; and the relation of the party giving it in charge to the Bank to any other person standing earlier in the progression of title. With the two last mentioned considerations

(1) *Nat. Gold Bank v. McDonald*, 51 Cal. 64, *Owens v. the Quebec Bank*, 30 Q. B. (U. C.) 382.

the collecting Bank has nothing whatsoever to do; it may ignore them utterly, in fact oftentimes it may even be incumbent upon it to ignore them utterly, for they may be rendered by circumstances in any particular case inconsistent with its own different, peculiar, and wholly independent obligation in the business.

The reiteration of this doctrine must be pardoned by reason of its importance. The common law, speaking through a great multitude of decisions, has laid down the rules which govern the presentment of checks as between the drawer, the indorsers, and the various subsequent holders; and there is complication enough in the topic. The common law has, in like manner, laid down the principles controlling the presentment of checks by a collecting Bank as between the Bank and the depositor; and in this topic also there is independent and ample complication. The entanglement of the two would result in a senseless and inextricable confusion. If, then, one deposits a check in a Bank, there is a certain time within which the Bank is bound to that depositor to present the check to the drawee for payment. It may be that a presentment within a shorter limit of time would be necessary to enable the payee to hold the drawer, or to enable the holder to hold his indorser, in case of non-payment; or it may be that presentment after that time would suffice for both these purposes. Neither of these facts modifies or affects the time within which the Bank is bound *to its customer* to present. By the ordinary rule of common law, this time is until the close of banking hours on the business day next following that on which the Bank comes into possession of the check (1). This is the general rule, and of course is liable to occasional modifications which will be noticed hereafter.

It may be well to illustrate the principles above laid down,

(1) Byles on Bills, p. 20. *Boddingon v. Schlencker*, 4 B. & Ad., 752 (24 E. C. L. R.); 1 Nev. v. Man., 540, *S. C. Alexander v. Burchfield*, 1 Cor. & M. 75 (41 E. C. L. R.), 34 Scott, N. R. 555, *Owens v. Quebec Bank*, 30 Q. B. (U.C.) 382.

for they are fundamental and important. A. and B. are both living in the same town, and keep their Bank accounts at the C. and D. Banks respectively, also in the same town. A. gives his check upon the C. Bank to B. on Monday. B. deposits it in the D. Bank on Tuesday. D. Bank presents it for payment to C. Bank on Wednesday. In this case the D. Bank will have done its full duty by B. under the rule of the common law above laid down. It will have presented for payment on the day after it received the check. So, if the C. Bank were paying checks all day Tuesday, but stopped payment on Wednesday morning, B. would have no remedy against D. Bank for laches or neglect of duty. Neither could he look to A., for A. had a right to have payment of his check demanded upon Tuesday, and the depositing it in the Bank could not be allowed to extend his risk over Wednesday also. If A. did not wish, or was not able, to deposit on Monday, he should either have made demand himself on Tuesday, instead of depositing, or he should have deposited under a special agreement with his Bank that it was either to demand payment on Tuesday, or else itself to assume the risk of the customary postponement till the following day. In like manner, if A. and B., and their respective Banks, were in two distant towns, and A. delivered or sent to B. his check, the common-law would declare in what manner and within what time B. must despatch his check to the C. Bank for payment. The later cases are to the effect that this should be done by mail, and during the day next following B.'s receipt of the check. But this is the rule as between A. and B. only, and the breach of it would only operate to imperil B.'s right of action against A. But if B. deposits in his Bank, his Bank has the right to forward the check to the C. Bank through its wonted channel or correspondence; and it is not ordinarily obliged to start it upon this progress until the day after it receives it.

Lord Ellenborough well said that it would be impossible for any banker, receiving checks by mails due at various

hours all through the day, to keep an army of clerks ready to present them, or forward them all, upon the day of receipt. "Bankers would be kept in a continual fever, if they were obliged to send out a check the moment it is paid in." The arrangement of presenting or forwarding on the next following day "appears subservient to general convenience, and not contrary to the law-merchant, which merely requires checks to be presented with reasonable diligence." (1)

In like manner each Bank in the chain of progress has a right to delay forwarding until the business day next following the day of its own receipt. So if C. Bank and D. Bank are in two provincial towns, and D. Bank has neither agent nor correspondent in the place where C. Bank is situated, it may send to its agent or correspondent in the nearest large town or city whose facilities for collecting from C. Bank are, or might reasonably be supposed to be, greater and more available. This course of proceeding on the part of B's Bank may be perfectly sufficient as acquittance of its duty and liability to B. Yet it may also be perfectly consistent with B's loss of his remedy against A, in case payment of the check should be lost by reason of its arriving at C. Bank later by this process than it would have arrived if sent according to those ordinary requirements of the common law which govern the relations of drawer and payee. It will be seen therefore that the deposit of a check in the holder's bank for collection may in a certain conjunction of circumstances result in his total loss of the amount, without any right of action against any person or corporation for reimbursement. Several facts must combine, it is true, to produce this conjunction, to wit: first, the presentment by the collecting Bank to the drawee Bank for payment must be later than it would have been, had the ordinary rule of presentment as between drawer and drawee been followed; second, it must appear that the check would have been paid had it been presented within the time set by this rule, or, at

(1) *Rickford v. Ridge*, 2 Camp. 537.

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least, that the Bank was paying during that time, and that the drawer's account was good for the sum called for; third, payment must be refused, and the refusal must be by reason of the failure of the Bank occurring subsequent to such time and before actual presentment, or by some other like reason beyond the control of the drawer.

But the common rule giving to the Bank the whole of the day following its receipt of the check is liable to be materially qualified through various causes. The time may be shortened or extended, either (1) by express instructions given by the depositor, or an express understanding had between him and the Bank, in reference to the particular transaction; or (2) by the uniform course of dealing previously pursued between himself and the Bank in the conduct of similar business; or (3) by the known usage of the individual Bank in such matters, provided the usage is one which the courts can properly sustain; or (4) by the general usage of Banks and custom of the banking business in the city or town where the Bank is situated. The customer is entitled to expect and require of his Bank that it shall not capriciously or needlessly deviate from the established system, whatever that may be; and if it does so deviate and a loss is the result, he may look to the Bank for compensation.

Of course the Bank must always make the presentment directly to the drawee, and cannot send it through other Banks or agents of any description, when the collecting Bank and the drawee Bank are both in the same place. If the collecting Bank, without distinct permission, sees fit to have recourse to them, it does so at its own risk of all the consequences which may result. (1)

LIABILITIES OF THE VARIOUS BANKS DIRECTLY TO
THE OWNER.

If commercial paper is deposited in a Bank for collection, and is by that Bank transmitted to any other Bank or agent,

(1) *Moule v. Brown*, 4 Bing. N. C. 265; 5 Scott, 694.

or through any series of Banks or agents, until it reaches the possession of the last Bank or agent, whose duty it becomes to make the collection, the Bank or agent actually making the collection can be held directly by the owner of the paper to pay the amount, less charges and expenses to him.

If his demand of payment is refused, without sufficient excuse, he may at once sue the Bank or agent. So if the paper is transmitted through several Banks, each one of them is directly liable to the owner for its prompt and accurate forwarding to the next Bank or agent. In this principle the courts may be regarded as concurring unanimously, though they reach it by somewhat various routes. Some of the opinions—those only of course which hold that the first Bank, or any Bank in the series, is not liable for the act of any subsequent Bank or agent, but only for the due performance of the especial task allotted to itself—regard each Bank, and the notary too, if a notary is employed, not as a sub-agent of its predecessor or of the first Bank, but as the direct agent of the owner of the paper, for the purpose of doing the precise act which falls to its share in the chain of proceeding.

CESSATION OF THE COLLECTING BANK'S LIABILITY TO THE OWNER.

When the last Bank has successfully effected the collection, it is directly liable to the owner to pay the money over to him only until such time as it has actually remitted the amount to its predecessor. (1) But some nice questions have arisen where such predecessor, intervening between the real owner of the paper and the Bank actually receiving the money, becomes insolvent before the receiving Bank has actually paid over the amount to this predecessor. The general rule of law is that if a person employs an agent to collect money under such circumstances that the agent naturally employs a sub-agent to accomplish the actual collection, then the principal will be entitled to sue the sub-agent, and collect the

(1) *Union Bank v. Johnson*, 9 Gill & J. 297.

money directly from him without regard to the relationship or condition of accounts existing between such agent and sub-agent, and although the sub-agent had no knowledge that his employer was an agent and not a principal. But if the owner has delivered the paper to the agent with no *indicia* whatsoever to show that such agent is not the owner, and the sub-agent receives it from the agent, supposing him to be the owner, and gives him credit upon the strength thereof, then the principal cannot recover from the sub-agent.

WHEN THE FIRST BANK BECOMES THE CUSTOMER'S DEBTOR.

The theory that the banks and agents subsequent to the first bank are independently direct agents of the holder of the paper, and immediately liable to him, is obviously inconsistent with holding that the receipt of the sum due by any subsequent bank is in law the receipt by the first bank, and at once renders the first bank answerable for the amount. Yet any feature in the dealing of the first bank with any of the parties, which manifests an understanding or intention on the part of that bank to adopt the receipt of the subsequent agent as being its own receipt, will be seized upon by the courts as a ground for holding it directly answerable to the depositor of the paper. In the case of *Mackersy v. Ramsay* (1) there appears to have been a distinct agreement between the parties that the first bank should pay the depositor so soon as it was notified of the payment having been actually made to the correspondent abroad. In *Tabor v. Perrot* (2) there was no such agreement; but the conduct of the first bank in ordering the foreign collecting bank to give it credit for the sum, and in drawing bills in its own behalf against this credit was regarded as constituting a complete appropriation of the amount to its own use rendering it directly responsible to the depositor of the paper, from the moment that the credit was given to it in accordance with its order.

(1) 9 Clark & F. 818.

(2) 2 Gall. 565.

Where the first bank pays the amount of the paper to the depositor, under the belief, arising from the circumstances, that its correspondent has successfully effected the collection, if it should afterward turn out that the collection has not in fact been thus effected, such bank may recover back from the depositor the amount so paid to him, on the ground that it was a payment made under mistake of fact. So if the payment was made by any bank, other than the collecting bank itself, to its predecessor in the series of agents. (1)

EFFECT OF INDORSEMENT AS BETWEEN BANK AND CUSTOMER.

Where the customer deposits in the bank commercial paper for collection, at the same time indorsing it over to the bank, the parties understanding that it is only intended by the indorsement to put the paper in such shape that the bank can collect upon it, the title in the paper does not thereby pass to the bank; nor does the bank owe the amount to the customer until such time as the collection is actually consummated. Neither is this strict right of the bank curtailed or altered simply because a practice has been allowed to prevail, by which it has allowed the depositor to draw against deposits of paper for collection before the collection has been actually made. This is a mere gratuitous privilege allowed by the bank, which does not grow into a binding legal usage. Thus it is very common for depositors to deposit checks with their banks, and to draw against them on the same day checks of their own, which may be presented for payment before the bank has had an opportunity to collect upon the deposited checks. In such cases banks are frequently wont to honor such checks of their customers upon the confidence that the deposited checks will be duly paid. But this habit of the banks is a pure favor, and if there be no distinct understanding to change the natural

(1) *Bank of Orleans v. Smith*, 3 Hill, 560; *East Haddam Bank v. Scovil*, 12 Conn. 303; *Mechanics' Bank v. Earp*, 4 Rawle, 384.

effect of such dealing, its long continuance gives no real right whatsoever to the depositor to demand its continuance or its practice in any individual case wherein the bank may, for any arbitrary reason, see fit to withhold the favor. (1) In England a decision, given by Lord Ellenborough (2) went much further even than this. Bills, not yet due, were sent to a country banker to collect; according to the custom of country bankers, these were actually entered in the banker's own books to the depositor's credit, with the proper discount, and he was thereafter entitled to draw against this credit before the actual collection. Upon the subsequent failure of the banker, before the collection, it was held that the title in the bills had not passed to him, and that the depositor should recover them specifically, or their amount if the bankrupt's assignees had already made the collection.

DEFAULT OF THE FIRST BANK.

Any act of neglect committed by the first bank itself renders it liable for the loss or injury resulting therefrom to the depositor. Thus if the paper is returned to it by its correspondent as uncollectible, it must in its turn promptly send the paper back with this information to the owner. (3) If it is the duty of the bank to procure the acceptance of a draft or bill, it is bound to procure an absolute and outright acceptance, legally binding upon the acceptor, at least so far as concerns the form and circumstance of the act itself of accepting. If it takes any acceptance which is irregular in form, and which therefore fails to hold the party drawn upon, and rests satisfied with this without at once notifying its principal, it will be liable itself to pay the amount of the paper, if otherwise the amount would be lost to the depositor by reason of his inability to hold the proper party as ac-

(1) *Scott v. Ocean Bank*, 23 N. Y. 289.

(2) *Giles v. Perkins*, 9 East, 12.

(3) *Van Wart v. Woolley*, 3 Barn & Cress. 439; *Wingate v. Mechanics' Bank*, 10 Barr, 104; *McKinster v. Bank of Utica*, 9 Wend. 46; 11 id. 473.

ceptor. (1) If the bank takes the check of the party who is bound to pay the paper, and thereupon surrenders the paper up to him, it assumes the responsibility for the check proving good. If it is not paid, the bank is still obliged to pay the amount to the person from whom it received the paper. (2)

A check lost in course of transmission to the drawee Bank, and which was never paid, or credited to depositor in the receiving Bank, gives no right of action against receiving Bank for money had and received to its use. (3)

DUTY OF COLLECTING BANK CONCERNING COLLATERAL SECURITY.

It has been held that where a time draft, drawn by consignors of merchandise upon the consignees, is forwarded to a bank without any special instructions, but having the bills of lading for the merchandise attached, the bank is justified, by reason of the implied intention of the parties and the usages and necessities of business, in surrendering the bills of lading to the consignees upon their acceptance of the draft, without waiting for them to make final payment of it. (4)

(1) *Walker, President of Bank of Utica v. Bank of State of New York*, 5 Seld. 582.

(2) *Commercial Bank v. Union Bank*, 1 Kern. 203.

(3) *Todd v. Gore Bank*, 1 Q.B. (U.C.) 40.

(4) *National Bank of Commerce v. Merchants' National Bank*, 91 U.S. (1 Otto) 92; *Lanfear v. Blossom*, 1 La. An. 148; *Wisconsin Marine & Fire Ins. Co. v. Bank of British North America*, 21 Upper Canada, Q.B. 284; S.C. affirmed, 2 Upper Canada, E. & A. 282.

CHAPTER X.

OF THE CHIEF EXECUTIVE OFFICER.

SECT. I.—THE CASHIER.

The cashier is the chief executive officer of the Bank, the one who *transacts* the business of the Bank, as distinguished from the regulation and control of it. This as we have already seen (1) is the peculiar function of the board of directors.

Great difficulty has been experienced in defining the exact functions of this officer on account of the necessity which exists of giving him sufficient practical power to enable him to conduct the daily routine of business, without trespassing upon the domain of discretionary authority. He is properly the executive agent of the directors, his duty being to carry out what they devise. They are responsible for the soundness of the action resolved upon; he is responsible for the honesty, accuracy, regularity, and skill with which that action is carried out. They are the mind and he the hands of the corporation. They may decide to make a certain loan or discount, to sell or mortgage corporate property. He will pay over the money, take the borrower's promissory note, and see that it is in proper form; he may, by direction of the board, affix the corporate signature and seal, and make delivery on behalf of the corporation of all instruments necessary to complete the conveyance of the mortgage. It is not wholly unapt to liken the board of directors to a bench of judges, and the cashier to the clerk of the court.

(1) *Ante*, page 70.

It may be laid down that the cashier, once appointed, is duly authorized to transact on behalf of the Bank all business which judicial decisions or banking usages have rendered inherent functions of the office designated by this name. Any act done by him within this scope and on behalf of the Bank is the act of the Bank. (1)

GENERAL STATEMENT OF THE CASHIER'S DUTIES.

The cashier is the chief "executive officer, through whom the whole financial operations of the bank are conducted." (2) Its money transactions, of every description, though they may not be determined by his discretion, will yet be conducted by and through him. (3) He has charge of all its property, its money, its securities, its valuable papers. (4) He has the superintendence of its books of accounts. (5) Judge Shepley has given the following very good abstract of the ordinary duties of a cashier: "To keep the funds, notes, bills, and other choses in action, of the bank, to be used from time to time for the exigencies of the bank; to receive directly, and through subordinate officers, all moneys and notes of the bank; to surrender notes and securities upon payment; to draw checks; to withdraw funds of the bank on deposit; and generally to transact, as the executive officer of the bank, the ordinary routine of business. But this ordinary duties of a cashier do not comprehend the making of a contract, which involves the payment of money, without an express authority from the directors, unless it be such as relates to the usual and customary transactions of the Bank." (6)

(1) *Burnham v. Webster*, 19 Me. 232.

(2) *Merchants' Bank v. State Bank*, 10 Wall. 604, at p. 650.

(3) *Baldwin v. Bank of Newbury*, 1 Wall. 234; *United States v. City Bank of Columbus*, 21 How. 356.

(4) *Wild v. Bank of Passamaquoddy*, 3 Mason, 505; *Franklin Bank v. Steward*, 37 Me. 519.

(5) *Sturges v. Bank of Circleville*, 11 Ohio St. 153; *Baldwin v. Bank of Newbury*, 1 Wall. 234.

(6) *Morse v. Mass. Nat. Bank*, 1 Holmes, C. C. 109.

THE CASHIER'S SUBORDINATES.

Of course, even in a small corporation, it will be impossible for the cashier personally to do all the business included in these general functions. He must have his subordinates, whose officers, will be offshoots of his own. "They are under his direction, and are, as it were, the arms by which designated portions of his various functions are performed." (1)

COLLECTION OF DEBTS.

It is the duty of the cashier to superintend the collection of debts owing to the bank, and to make up the accounts of the sums due. Payment of them is properly made to him in his official capacity, and discharges the debtor, even though the cashier subsequently misappropriates the money, and fails to bring it to account in the bank. Upon the receipt of payment the cashier may deliver up the evidences of indebtedness held by the Bank, may execute an acknowledgment, release, or acquittance to the debtor if need be, and may deliver and transfer back to him any pledge or collateral security given by him to the Bank. (2) It has even been held that where the borrower had given a mortgage of real estate to the Bank, the cashier might legally discharge the same by virtue of his ordinary authority. Or if the Bank has bought the mortgaged property at the sheriff's sale, the cashier may assign the certificate of sale. It makes no difference though the instrument may require to be executed under the corporate seal. The party who has made the payment is entitled to the discharge or assignment. In seeking to obtain it, he is justified in dealing with the principal business officer of the Bank. (3)

(1) Merchants Bank v. State Bank, 10 Wall, 604.

(2) Concord v. Concord Bank, 16 N. H. 26; Badger v. Bank of Cumberland, 26 Me. 428; United States v. City Bank of Columbus, 21 How. 356.

(3) Ryan v. Dunlap, 17 Ill. 40; Bank of Vergennes v. Warren, 7 Hill, 91.

POWER OF BORROWING.

The cashier may borrow money on behalf of the Bank, and may bind the Bank by a promissory note executed therefor. (1) Such is the usage of the Banking business. Though if in any individual institution any other officer is selected for this duty, the cashier could no longer bind the Bank to any lender who was aware of the variation. The right of borrowing is a function of which he will be wholly deprived by the act of the directors in selecting any other person as their general borrowing agent. But the usage to allow him to borrow is so universal that notice of the deprivation must be brought home to any person who is to be affected by it. Otherwise the public are warranted in dealing with him on the assumption that he possesses it. The power extends only to borrowing in the ordinary course of the daily business of the Bank. But he cannot borrow simply for the purpose of increasing the available funds of the Bank, so that in effect its disposable working capital shall be increased. This is exercising a discretionary control over its affairs which none but the directors possess.

CHARGE OF THE PERSONALITY OF THE BANK, AND HEREIN
ALSO OF INDORSEMENTS.

The cashier has full charge, control and power of disposition over all personal property of the Bank, whether specie, notes, bills, bonds, or of whatsoever other description it may be. (2) All its negotiable paper he may negotiate and transfer on its behalf, (3) and to this end may indorse it over, so as to bind the Bank like any ordinary indorser on similar

(1) *Barnes v. Ontario Bank*, 10 N. Y. 152; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120; *Sturges v. Bank of Circleville*, 11 Ohio St. 153; *Ridgway v. Farmer's Bank*, 12 Serg. & R. 256.

(2) *Wild v. Bank of Passamaquoddy*, 3 Mason, 505; *Franklin Bank v. Steward*, 37 Me. 519; *Morse v. Massachusetts National Bank*, 1 Holmes, C. C. 209.

(3) *Wild v. Bank of Passamaquoddy*, 3 Mason, 505.

paper. But the character of negotiability is a strict limitation upon his inherent power. He cannot, solely by virtue of his office, pass title to non-negotiable paper of any sort, or to any other description of corporate property, as for example a judgment given in favor of the Bank. His action in making transfers of this latter description can be sustained only by authority directly conferred by the directors, or arising from established usage. (1) Of course this power of transfer, like almost every power which an agent can possess, may easily be so abused by him as to render him liable to his principal. It is very difficult to say precisely how much discretion can be properly exercised by the cashier in trading in negotiable securities. Clearly he has no right to push it to that point where virtually it become a considerable and important branch of the Bank's business, and is nevertheless conducted solely by himself.

Since the cashier has the general power to indorse over bills and notes of the Bank, for the purpose of passing title therein, he of course has the lesser and included power to indorse for special purposes, as for discount. So also for collection, and for transmission for collection, he may indorse both paper belonging to the Bank and paper intrusted to it for collection, or given to it as collateral security. (2) If paper is indorsed by him for this special and limited purpose, and is subsequently fraudulently converted, yet if the indorsement be general and the paper comes to the hands of a *bona fide* holder for value and without notice, who presumes and has a right to presume from the style of the indorsement that it was made in the ordinary course of business, and created a guaranty on the part of the Bank, the Bank may be held to respond as an ordinary indorser. (3)

The various forms of indorsement which have been employed by cashiers have given rise to important questions

(1) *Barrick v. Austin*, 21 Barb. 241; *Holt v. Bacon*, 25 Miss. 567.

(2) *Elliot v. Abbot*, 12 N. H. 549; *Corser v. Paul*, 41 id. 24; *Potter v. Merchants' Bank*, 28 N. Y. 641.

(3) *Robb v. Ross County Bank*, 41 Barb. 586.

concerning their respective validity. The possible divergence seems to be limited substantially to four different methods, viz., "—— Bank, by A. B., cashier;" "A. B., cashier of the —— Bank;" "A. B., cashier;" or finally simply the name of "A. B.," without any other words whatsoever. These are the four cardinal forms which alone call for consideration. Others are only slight modifications of these, such as "For the —— Bank, by A. B., cashier," or verbal variations by the use of simple abbreviations, as "cash." "cas." or "cr." Such will be easily recognized as substantially identical with one or other of these four, and will be governed by the same rules, respectively.

It is obvious at once that the first of these forms is the technically proper one. It alone accords with the old established rule of the common law of agency, that where a contract is made through an agent, the principal must be directly named as the contracting party, properly with the addition of further words sufficiently indicating that the principal in this particular case is contracting through the instrumentality of A. B., authorized agent, and the signature must be in like manner of the name of the principal with the additional intimation that it is written by his agent on his behalf. (1) But though it is safest and wisest always to indorse in this manner, and so to obtain the full protection of the ancient and general principle, yet special decisions have declared other forms, theoretically less correct, to be sufficient. So it can no longer be questioned that the second and third forms will bind the bank. (2)

But as far as the courts have gone in declaring the indorsement in the third form to be binding as the indorsement of the corporation, they have yet much further to go if they are

(1) *Spear v. Ladd*, 11 Mass. 94.

(2) *State Bank v. Fox*, 3 Blatchf. 431; *Bank of Genesee v. Patchin Bank*, 3 Kern. 309; *Northampton Bank v. Pepoon*, 11 Mass. 288; *Folger v. Chase*, 18 Pick. 63; *Robb v. Ross County Bank*, 41 Barb. 586.

resolved to sustain the validity of the fourth form as a corporate undertaking. We find no adjudicated case which directly settles this point. (1)

THE CORRESPONDENCE OF THE BANK.

The cashier has charge of the correspondence of the Bank. Letters on corporate business are properly addressed to him, and whatever statements or information are contained in them will, in law, affect the Bank with notice. If the subject written about is one in which he has no authority to act, or no duty to perform, it is nevertheless his duty to communicate the contents of the letter to the officials within whose province the object-matter falls. It is his duty to see that the information contained in the letter is promptly laid before the proper person. A cashier has no power to contract for the Bank, but if the negotiations concerning a proposed contract are conducted by letters, he properly writes and receives these, and the assent of the third party to the propositions of the Bank, expressed by him in a letter written to the cashier, affects the Bank and completes the legal contract. (2)

POWER TO DRAW CHECKS.

The cashier has power to draw checks or drafts upon the funds of the Bank deposited elsewhere. Indeed he is ordinarily the only officer of the institution who can legally do this. It is proper for him to designate himself as "Cashier of the ——— Bank," in order to show that he is acting officially, and that the check is intended to withdraw corporate funds.

OF EXTRAORDINARY ACTS AND SPECIAL POWERS AND DUTIES.

At this point closes the list of the powers and duties which the cashier may exercise simply by virtue of his office, and

(1) But see remarks of Judge Denio in, *Bank of Genesee v. Patchen Bank*, 3 Kern 309.

(2) *New Hope and Delaware Bridge Co. v. Phoenix Bank*, 3 Comst. 166; *Branch Bank v. Steele*, 10 Ala. 915.

within the scope of which he may bind the Bank by reason of his being held out to the world as cashier, and as entitled to fulfil all the ordinary and inherent functions of that office. Outside these limits, however, there are great numbers of acts which are frequently undertaken by cashiers, which are strictly consistent with the nature of their office, and which are properly allotted to them for performance. Within this wide classification may be included everything of an executive character, and many matters partially discretionary, or discretionary within certain limits, so that in delegating power over them the directors do not, in fact, part with any governmental authority or divest themselves of the performance of any inalienable duty. That corporate agents, especially agents having such large and important general powers as are enjoyed by Bank cashiers, should be allowed some degree of latitude of discretion is inevitable, and, within reasonable limits, is desirable. But the power to exercise discretion, except in comparatively unimportant matters of routine, should be distinctly conferred by the directors or very clearly proved by custom. Even if it be thus conferred or proved, it will be upheld only upon the condition that it is not a material encroachment or usurpation upon the governmental province. It has already been seen that of their obligations and responsibilities of this high nature the directors cannot strip themselves if they would. They are entitled to abdicate only by means of a direct and formal resignation.

SELECTION OF DEPOSITORS.

The cashier is the proper officer to accept or refuse the account of one who wishes to become a depositor in the Bank. (1) This of course is the case only in the absence of action by the directors in the premises. The decision of the cashier could at any time be overruled by them if they should see fit.

(1) *Thatcher v. Bank of State of New York*, 5 Sandf. 121.

LIABILITY OF THE CASHIER TO THE BANK.

The cashier is, of course, liable to the Bank, in an action of damages to make good any and all injury arising from his fraudulent or wrongful acts of an official nature, from his unauthorized assumption of power, or from his breach of the directions imposed upon him to govern his conduct in his agency. (1) How far he is responsible for innocent errors and mistakes will be considered under the topic of "Official Bonds." The tellers, book-keepers, &c., are his subordinates and sub-agents. But he is not answerable, like an ordinary principal, for their defaults, whether intentional or innocent, unless perhaps in those cases in which it can be shown satisfactorily that the default was occasioned, or opportunity or temptation thereto was furnished, by his improper or negligent performance of his duty of general superintendence. This rule is supported by the necessity of the business. It is impossible for him to be omnipresent and omniscient among all his servants in the institution, and he is not liable for his failure to perform this impossibility. He is required only to direct them properly in the performance of their several functions, and to exercise the most thorough supervision which is practicable in view of the amount of daily business and the method of conducting the routine of daily affairs. The sub-officers and their respective provinces are usually well known. But if the duties which are ordinarily done solely by the cashier become too onerous to be executed by one man, any arrangement for a partial sub-delegate, which circumstances authorize the cashier in assuming to be satisfactory to and ratified by the directors will be valid, and will thereafter save the cashier from liability for frauds or errors committed in the delegated department. (2)

(1) *Austin v. Daniels*, 4 Den. 299.

(2) *Bank of the State v. Comegys*, 12 Ala. 772.

CHAPTER XI.

REGULATIONS FOR THE GUIDANCE OF OFFICERS OF BRANCHES.

SECT. 1—CASH AND SECURITIES.

SECT. 2—GENERAL BUSINESS.

SECT. 3—DISCOUNTS.

SECT. 4—OVERDUE BILLS.

SECT. 5—INSURANCE.

SECT. 6—WAREHOUSE RECEIPTS.

SECT. 7—GENERAL INSTRUCTIONS.

In order that managers and other officers at Branches and Agencies may be fully informed of their duties and responsibilities, many Canadian Banks issue a form of rules and regulations for their guidance. These regulations may be summarized as follows:

SECT. 1—CASH AND SECURITIES.

1. The combination of the cash safe shall be known to the Manager alone. He shall keep therein all the cash and securities of his Agency.

2. The Teller shall have placed in his hands only such sums as are necessary for the current business, his cash shall be kept in a separate cash box and handed over to the Agent at the close of each day's business, and deposited by him in the cash safe.

3. The Manager shall keep a constant supervision over the Teller's cash, and shall count the same at irregular intervals, and not more seldom than four times every month.

4. All cash remittances must be made by express, except when other instructions are received from the Head Office. Checks and drafts to order may be sent by mail.

5. When customers order money to be forwarded to them by mail they must order the same (in writing) to be sent at their own risk.

6. All securities requiring registration shall be registered immediately on completion. A proper record of all securities shall be kept by the Manager and when given up, a receipt shall be taken.

7. All powers of Attorney must be examined by the Manager before being recorded or acted upon.

SECT. 2—GENERAL BUSINESS.

8. The Manager shall study carefully the Acts relating to Canadian Banks and Banking as well as the Acts relating to Insolvency. Also the provisions of the law respecting Bills of Exchange, checks and promissory notes. He shall also make himself acquainted with such securities as can be legally taken by a Bank, and the method of transferring the same.

9. He shall make himself acquainted as fully as possible with the business men of the locality in which his Branch is situated, ascertain the general reputation and commercial standing of each, recording the same in a book to be kept for the purpose. He shall exert himself to secure as many desirable accounts as possible, and generally to increase the business and profits of his Branch by obtaining good discount, deposit and circulation accounts.

10. The Agent shall carefully watch any indications of weakness on the part of any customer of the Bank; he shall report the same at once to the Head Office, and shall at the same time take prompt and judicious measures to prevent loss to the Bank.

11. The Manager shall not engage directly nor indirectly in any mercantile or brokerage transaction, nor speculate in stock, exchange, grain or any other article. This rule shall apply to all the officers of the Bank, and any breach thereof shall subject the offending officer to instant dismissal.

12. No officer of the Bank shall take any active part in party politics or municipal affairs, by canvassing for candidates, sitting on committees or the like, but this rule shall in no way interfere with any officer voting at any election as he may think fit.

SECT. 3—DISCOUNTS.

13. The Manager must see that all notes and bills of exchange offered for discount are properly drawn, and indorsed. When the signature of an indorser is not well known to him, the indorser must appear personally at the Bank and sign his name in the signature Book.

14. No paper shall be discounted that does not bear two responsible names, or one responsible name and a good collateral security. One at least of the parties shall reside in the town or neighbourhood, and shall as a general rule be a customer of the Bank. This rule applies also to checks and drafts at sight or at short dates.

15. All discounts must be based upon some mercantile transaction or upon some merchantable property; therefore no advances shall be made on the security of real estate or vessel property, nor shall any farmer's paper be discounted to a greater amount than is likely to be realized from saleable products at the close of the season. A responsible farmer may, however, be accepted as indorser for another responsible party engaged in the purchase of grain, hay, lumber or other merchantable article, but not for a greater amount than one-third of his estimated responsibility.

16. Discounts are not to be granted to professional men

without authority from the Head Office, and such authority must be obtained in reference to every note discounted, and every renewal of such discount.

17. The discounting of bills or promissory notes and the making of loans of whatever nature, being a special prerogative of the Board of Directors, the Manager will be careful to obtain the special authority of the Head Office for all important transactions, and the prompt ratification of all his operations, by reporting the same as often (daily or otherwise) as the General Manager may direct.

18. No customer shall be allowed to overdraw his account, nor shall any money be advanced on "Bons" or checks to be held as cash. For any such overdraft or advance the official making the same shall be held personally responsible.

SECT. 4—OVERDUE BILLS.

19. When bills become overdue the Manager must at once endeavour to effect a settlement and keep such bills constantly in view until paid. After one week he shall report such bills to the Head Office with such explanations as he is able to give in reference to the same.

20. No debt is to be compromised nor any long extension granted without the approval of the Head office.

21. *The Manager must not grant time to a promiser or acceptor without the consent of the indorser. The same rule applies to a compromise, or settlement of any kind.*

SECT. 5—INSURANCE.

22. When advances are made on warehouse receipts or bills of lading, the Manager must see that the property is insured in a responsible office, and the interest therein transferred to the Bank with consent of the company. The same course must be adopted when immovable property is taken

as security. The Manager should also inform himself from time to time whether the customers of the Bank keep their properties and merchandize insured.

SECT. 6—WAREHOUSE RECEIPTS.

23. Warehouse receipts shall only be taken when issued by parties in good standing, and granted to parties in good credit and carrying on some regular commercial business. The Manager must see that the receipt is properly drawn up, that the law respecting warehouse receipts is complied with, and that a fair margin is allowed for probable depreciation. The same rule must be followed when making advances on bills of lading.

SECT. 7—GENERAL INSTRUCTIONS.

24. The foregoing regulations, in so far as they are applicable, shall apply to every officer of the Branch.

25. Any deficiency in the cash must be made good by the Teller or by the Manager when acting as teller, but any surplus must be entered to an account called "Teller's Surplus."

26. The Manager will maintain proper discipline in the office. He will see that every officer of the Bank is regularly and punctually at his post, and that the business of each day is completed on the same day. No person shall be permitted to visit the office except on business and no one shall be allowed to remain in the office after his business is completed.

27. *Strangers seeking to open accounts must be introduced by some well known and respectable person, and no drafts, checks or bills of exchange are to be taken from such without the closest scrutiny and a good local endorser.*

28. No Manager or other officer of the Bank shall, under

pain of dismissal, lend his name whether by indorsement or otherwise to any party whomsoever.

29. All orders or instructions from the Head Office are to be in writing, verbal or telephonic instructions to be confirmed also in writing.

30. In transacting business with the Bank's customers the Manager's words should be few and well chosen. Except in matters of importance, he should not occupy much time with any one person, and should be accessible during business hours to all the customers of the Bank without causing them long delay. In all his correspondence, the Manager should express himself clearly and in as few words as possible.

31. In declining a transaction, the Manager should be careful, as far as it is possible, to do so without giving offence.

32. The Manager or other officer, whose duty it is to receive deposits, or sums of money on any account whatsoever, or to make payments or remittances, should not receive such monies nor make such payments or remittances without giving or taking proper vouchers for the same. All letters containing checks to order should be carefully copied in the letter-book.

33. Collections from other banks and private firms are to receive prompt and careful attention.

THE
LAW AND PRACTICE
OF
BANKING CORPORATIONS.

PART SECOND.
COMMENTARY ON THE BILL AND NOTE ACT.

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49 VICTORIA. CHAPTER 123.

An Act respecting Bills of Exchange and Promissory A. D. 1886.
Notes.

HER Majesty, by and with the advice and consent
of the Senate and House of Commons of Canada,
enacts as follows:—

1. Every bill of exchange or promissory note which is made payable at a month, or months, from and after the date thereof, shall become due and payable on the same numbered day of the month in which it is made payable as the day on which it is dated,—unless there is no such day in the month in which it is made payable, in which case it shall become due and payable on the last day of that month,—with the addition, in all cases, of the days of grace allowed by law. 35 V., c. 10, s. 1.

On what days
bills and notes
shall mature.

2. Whenever the last day of grace, in respect of the payment of a bill of exchange or a promissory note, falls on a legal holiday or non-juridical day in the Province where any such bill or note is payable, then the day next following not being a legal holiday or non-juridical day in such Province shall be the last day of grace as to such bill or note. 35 V., c. 8, s. 8, *part*;—
42 V., c. 47, s. 4.

When last day
of grace is a
non-juridical
day.

3. In all matters relating to bills of exchange and promissory notes, the following and no other shall be observed as legal holidays or non-juridical days, that is to say:—

Non-juridical
days.

Elsewhere
than in Que-
bec.

(a.) In all the Provinces of Canada, except the Province of Quebec—

Sundays;
New Year's Day;
Good Friday;
Easter Monday;
Christmas Day;

The birthday (or the day fixed by proclamation for the celebration of the birthday) of the reigning Sovereign;

The first day of July (Dominion Day,) and if that day is a Sunday, then the second day of July as the same holiday;

Any day appointed by proclamation for a public holiday, or for a general fast, or a general thanksgiving throughout Canada: and the day next following New Year's Day and Christmas Day, when those days respectively fall on Sunday;

In Quebec.

(b.) And in the Province of Quebec the said days, and also—

The Epiphany;
The Annunciation;
The Ascension;
Corpus Christi;
St. Peter and St. Paul's Day;
All Saints' Day,
Conception Day;

Days fixed by
proclamation.

(c.) And also, in any one of the Provinces of Canada, any day appointed by proclamation of the Lieutenant Governor of such Province, for a public holiday, or for a fast or thanksgiving within the same. 35 V., c. 8, s. 8, *part*;—42 V., c. 47, s. 3;—46 V., c. 20, s. 11.

Acceptance
to be in
writing on
the bill.

4. No acceptance of any bill of exchange shall be sufficient to bind or charge any person, unless such acceptance is in writing on the bill, or if there is more than one part of such bill, then on one of the said parts.

C. S. U. C., c. 42, s. 7;—C. S. L. C., c. 64, s. 5;—28 V. (N.S.), c. 10, s. 5;—R. S. N. B., c. 116, s. 4;—27 V. (P.E.I.), c. 6, s. 2.

5. Notice of the protest or dishonor of any bill of exchange or promissory note payable in Canada shall be sufficiently given, if it is addressed, in due time, to any party to such bill or note entitled to such notice, at the place at which such bill or note is dated, unless any such party has, under his signature, on such bill or note, designated another place,—and in such latter case such notice shall be sufficiently given if addressed to him, in due time, at such other place; and such notices so addressed shall be sufficient, although the place of residence of such party is other than either of such before mentioned places. 37 V., c. 47, s. 1.

What notice of protest or dishonor shall be sufficient.

6. No damages shall be recoverable in any action, suit or proceeding, brought in any Province of Canada, upon any bill of exchange drawn upon any person at any place in Canada or in the Island of Newfoundland, against any party thereto, except for the amount for which such bill of exchange is drawn, and for such further amounts as arise from the noting and protest of such bill of exchange, and interest thereon, and exchange and re-exchange thereon:

Damages on bills payable in Canada or Newfoundland.

2. No damages shall be recoverable in any action, suit or proceeding, brought in any Province of Canada, upon any bill of exchange drawn upon any person at any place not being in Canada or in the Island of Newfoundland against any party thereto, except for the amount for which such bill of exchange is drawn, and for two and one half per cent. thereon, and for such further amounts as arise from the noting and protest of such bill of exchange, and interest thereon, and exchange and re-exchange thereon. 38 V., c. 19, ss. 1 and 2.

And on bills payable elsewhere.

Protest of
non-accepted
or unpaid
bills or notes
in Nova
Scotia.

7. All bills of exchange and promissory notes drawn or made at any place in the Province of Nova Scotia, for the sum of forty dollars and upwards, upon or in favor of any person or persons in the said Province, may, on default of the acceptance or payment thereof, be protested by a notary public; and such protest shall, in any action on such bill or note, be *prima facie* evidence of presentation and dishonor, and also of service of notice of such presentation and dishonor as stated in such protest; for which protest there shall be charged a notarial fee of fifty cents for protest and twenty-five cents for each notice. 42 V., c. 46, s. 1.

And in Prince
Edward Is-
land.

8. All bills of exchange and promissory notes payable at any place in the Province of Prince Edward Island, for the sum of forty dollars and upwards, may, on default of the acceptance or payment thereof, be protested by a notary public; and such protest shall, in any action on such bill or note, be *prima facie* evidence of presentation and dishonor, and also of service of notice of such presentation and dishonor, as stated in such protest; for which protest there shall be charged a notarial fee of fifty cents for protest and twenty-five cents for each notice. 46 V., c. 22, s. 2.

General ac-
ceptance of a
bill in P.E.I.

Qualified
acceptance.

9. In the Province of Prince Edward Island, if any person accepts a bill of exchange, payable at the office or place of business of any bank or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill; but if the acceptor, in his acceptance, expresses that he accepts the bill payable at the office or place of business of any bank, or other place only, and not otherwise or elsewhere, such acceptance shall be deemed, and taken to be, to all intents and purposes, a qualified acceptance of such bill; and the acceptor shall not be liable to pay the said bill,

unless payment has been first duly demanded at such office or place of business in such bank or other place. 27 V. (P. E. I.), c. 6, s. 1.

10. When any promissory note or bill of exchange is payable at any place out of the Province of New Brunswick, whether the same is drawn in or out of the said Province, a notarial protest of the presentment and dishonor of such promissory note or bill of exchange shall be received in all courts in the said Province as evidence of the fact of presentment and dishonor stated in such protest, in like manner as in case of a protest of non-payment of a foreign bill of exchange. 22 V. (N. B.), c. 22, s. 4.

11. No clerk, teller or agent of any Bank shall act as a notary in the protesting of any bill or promissory note, payable at the Bank, or at any of the agencies of the Bank, in which he is employed. C. S. C., c. 57, s. 3.

12. Every bill of exchange or promissory note, the consideration of which consists, in whole or in part, of the purchase money of a patent right, or of a partial interest, limited geographically or otherwise, in a patent right, shall have written or printed prominently and legibly across the face thereof, before the same is issued, the words "given for a patent right." 47 V., c. 38, s. 1.

13. The indorsee or other transferee of any such instrument, having the words aforesaid so printed or written thereon, shall take the same subject to any defence or set-off in respect of the whole or any part thereof, which would have existed between the original parties. 47 V., c. 38, s. 2.

14. Every one who issues, sells or transfers, by indorsement or delivery, any such instrument not having the words "given for a patent right" printed or written in manner aforesaid across the face thereof, knowing the consideration of such instrument to have consisted,

in whole or in part, of the purchase money of a patent right, or of a partial interest, limited geographically or otherwise, in a patent right, is guilty of a misdemeanor, and liable to imprisonment for any term not exceeding one year, or to such fine, not exceeding two hundred dollars, as the court thinks fit. 47 V., c. 38, s. 3.

Provisions
applicable to
Ontario.

15. Sections sixteen to twenty-six, both inclusive, apply to the Province of Ontario only.

General
acceptance
and promise.

16. If any person accepts a bill of exchange, payable at a Bank, or at any other particular place, without further expression in his acceptance, or makes a promissory note payable at a bank, or at any particular place, without further expression in that respect, such acceptance and such promise shall be deemed and taken to be a general acceptance and a general promise respectively :

Qualified ac-
ceptance and
promise.

2. If the acceptor expresses, in his acceptance, that he accepts the bill payable at a bank, or at any other particular place only and not otherwise or elsewhere, or if the maker of a promissory note expresses in the body of the note that he promises to pay at a bank, or any other particular place only, and not otherwise or elsewhere, then such acceptance or promise shall be deemed and taken to be a qualified acceptance or promise, and the acceptor or maker shall not be liable to pay the bill or note, unless payment has been first duly demanded at such bank or other place. C. S. U. C., c. 42, ss. 5 and 6.

Bill or note
not void for
usury in cer-
tain cases.

17. No bill of exchange or promissory note, although given for a usurious consideration, or upon a usurious contract, shall be void in the hands of an indorsee (or if a note transferable by delivery, in the hands of a person who acquired the same as bearer), for valuable consideration, unless such indorsee or bearer had, at the time of discounting or paying such consideration for the same,

actual knowledge that such bill of exchange or promissory note was originally given for a usurious consideration upon a usurious contract. C. S. U. C., c. 42, s. 8.

18. No bill of exchange shall be presented for acceptance on any non-judicial day. C. S. U. C., c. 42, s. 19.

19. If any promissory note payable only at some place in the United States of America, or in some one of the Provinces, Territories or Districts of Canada other than the Provinces of Ontario and Quebec, or in the Island of Newfoundland, and not otherwise or elsewhere, is made or negotiated within the Province of Ontario, and is protested for non-payment, the holder shall, in addition to the principal sum mentioned in the note, recover damages at the rate of four per cent. upon such principal sum, and also interest thereon at the rate of six per centum per annum, to be reckoned from the day of the date of the protest, and such aggregate amount, together with the expenses of protesting the note, and all charges and postages incurred thereon, shall be paid to the holder at the current rate of exchange of the day when the protest is produced and repayment demanded, that is to say: the holder of any such note, returned under protest, may demand and recover from the maker or indorsers thereof so much current money of Canada as shall then be equal to the purchase of a bill of exchange of the like amount drawn on the same place at the same date or sight, together with the damages and interest above mentioned, and also the expense of protesting the note and all charges and postages incurred thereon. C. S. U. C., c. 42, s. 11.

20. When the holder of a protested bill or note returned for non-payment, notifies the drawer, maker or indorser of the dishonor thereof, in person, or delivers notice thereof, in writing, to an adult person at his or their counting house or dwelling house, and they

No present-
ment on non-
judicial days.

Damages and
interest
allowed in
certain cases
upon dis-
honored
notes.

How rate of
exchange
shall be
ascertained.

disagree about the then rate of exchange for commercial bills, the holder and the drawer, maker or indorser so notified, or any of them, may apply to the president or, in his absence, to the secretary of any board of trade or chamber of commerce in the city or town, in which the holder of such protested bill or note, or his agent, resides, or in the city or town nearest to the residence of such holder or agent, in which there is a board of trade or chamber of commerce, and obtain from such president or secretary a certificate in writing under his hand, stating the said rate of exchange; and the rate stated in such certificate shall be final and conclusive as to the then rate of exchange, and shall regulate the sum to be paid accordingly. C. S. U. C., c. 42, s. 12.

Inland bills
and notes to
bear interest.

21. Every bill, draft and order drawn by any person in the Province of Ontario on any person in either of the Provinces of Ontario or Quebec, and every promissory note made or negotiated in the Province of Ontario, if protested for non-payment, shall be subject to interest from the date of the protest, or if interest is therein expressed as payable from a particular period, then from such period to the time of payment; and in case of protest, the expense of noting and protesting, and the postages thereby incurred, shall be allowed and paid to the holder, over and above the said interest. C. S. U. C., c. 42, s. 13.

Protest may
be made on
day of dishonor.

22. Every protest of inland or foreign bills of exchange or promissory notes, for dishonor, either by non-acceptance or non-payment, may be made on the day of such dishonor, at any time after non-acceptance, or in case of non-payment, as any time after the hour of three o'clock in the afternoon. C. S. U. C., c. 42, s. 15.

How notice of
protest may
be served.

23. A notice of such protest shall be sent to each of the parties to the bill or note, and such notice shall be

deemed to have been duly served, for all purposes, upon the person to whom the same is addressed, if it is deposited in the post office nearest to the place of making presentment of such bill or note, at any time during the day whereon such protest has been made, or the next juridical day then following. C. S. U. C., c. 42, s. 16.

24. Every such protest and notice may be according to the forms set forth in schedule A to this Act, or to the like effect. C. S. U. C., c. 42, s. 21, *part*.

Form of protest and notice.

25. The fees to be taken by notaries public, for the services hereinafter mentioned, shall be as follows, and no more, that is to say : for the protest of any bill, draft, note or order, fifty cents ; for every notice, twenty-five cents ; and for postage, the amount actually expended. C. S. U. C., c. 42, s. 22 ;—C. S. C., c. 57, s. 1.

Notary's fees in Ontario.

26. The Act of the Parliament of Great Britain, passed in the fifteenth year of the reign of King George the Third, intituled. "*An Act to restrain the negotiation of Promissory Notes and Inland Bills of Exchange, under a limited sum, within that part of Great Britain called England,*" and the Act of the said Parliament, passed in the seventeenth year of his said Majesty's reign, intituled "*An Act for further restraining the negotiation of Promissory Notes and Inland Bills of Exchange, under a limited sum, within that part of Great Britain called England,*" which are inapplicable to the Province of Ontario, shall not extend to or be in force therein, nor shall the said Acts make void any bills, notes, drafts or orders, which have been or may be made or uttered therein. C. S. U. C., c. 42, s. 1.

Certain statutes respecting small notes not in force in Ontario.

27. The following sections of this Act apply to the Province of Quebec only.

Provisions applicable to Quebec.

28. The several fees and charges mentioned in schedule B to this Act, relating to the protesting and noting of bills and notes in the Province of Quebec,

Notary's fees in Quebec.

together with the postages pre-paid upon notices deposited at any post-office, may be claimed from the holder of the bill or note by the notary or justice of the peace performing such duties, and shall be recovered from such parties thereto as are liable for the payment of the same. C. S. L. C., c. 64, s. 21.

Forms in
Quebec.

29. The several notings, protests, notices thereof, and services of notices hereinbefore mentioned, shall be in the forms set forth in the said schedule. C. S. L. C., c. 64, s. 22.

Penalty if
unqualified
person notes
or protests
bills or notes.

30. Every person who represents himself to be a notary for or justice of the peace in the Province of Quebec, and who acts as such in and about the protesting of a bill or note, or in and about the noting of a bill, not being such notary for or justice in the Province of Quebec, is guilty of a misdemeanor, and liable to imprisonment for a term not exceeding six months. C. S. L. C., c. 64, s. 23.

The articles of the Civil Code of Lower Canada relating to this subject will be found in the collection of Statutes not consolidated.

SCHEDULE A.

On this day of , in the year one thousand eight hundred and , at the request of , holder of the bill of exchange hereunto annexed, I, , a notary public for the Province of Ontario duly appointed, did exhibit the said bill unto , at , being the place where the same is payable, and speaking to *him*, did demand payment of the said bill ; to which demand *he* answered

Wherefore, I, the said notary, at the request aforesaid, have protested, and do hereby solemnly protest, as well against all the parties to the said bill as against all other persons whom it may concern, for all interest, damages, costs, charges, expenses and other losses suffered or to be suffered for want of payment of the said bill. And afterwards, on the day and year mentioned in the margin, I, the said notary public, did serve due notice, according to law, of the said presentment, non-payment and protest of the said bill, upon the several parties thereto, by depositing, in Her Majesty's post office at , being the nearest post office to the place of the said presentment, letters containing such notices, one of which letters was addressed to each of the said parties, severally ; the superscription and address of which letters are respectively copied below, as follows, that is to say :

(Here insert the directions of the letters.)

In testimony whereof, I have hereunto set my hand and affixed my seal of office, the day and year first above written.

(Signature) L. S.

FORM OF NOTICE TO PARTIES.

To Mr.

(date.)

SIR,

Take notice that a bill of exchange, dated on the day of , for the sum of \$ (or £) , drawn by , on and accepted by , payable (*three months*) after the date thereof, at the Bank of , in (*Toronto*), and indorsed by A.B., C.D., E.F., &c., was this day presented by me for payment at the said Bank, and that payment thereof was refused, and that , the holder of the said bill, looks to you for payment thereof. Also, take notice that the same bill was this day protested by me for non-payment.

Your obedient servant,

A. B.,

Notary Public.

The above forms may be changed to suit protest for non-acceptance or non-payment of bills, or non-payment of notes.

C. S. U. C., c. 42, s. 21, *part.*

SCHEDULE B.

TARIFF OF FEES AND CHARGES IN THE PROVINCE OF QUEBEC.

For presenting and noting for non-acceptance any bill of exchange, and keeping the same on record..	\$1 00
Copy of the same when required by the holder	0 50
For noting and protesting for non-payment any bill of exchange or promissory note, draft or order, and putting the same on record.....	1 00
For making and furnishing the holder of any bill or note with duplicate copy of any protest for non-acceptance or non-payment, with certificate of service and copy of notice served upon the drawer and indorsers.....	0 50

(*data.*)

NOTING FOR NON-ACCEPTANCE.

On the _____ 18____, the above bill was, by me,
at the request of _____, presented for acceptance
to E.F., the drawee, personally (or, at his residence, office
or usual place of business in the city (town or village) of
_____, and I received for answer, “_____”.

The said bill is therefore noted for non-acceptance.

Notary Public.

18

PROVINCE OF

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Notary Public.

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FORM B.

PROTEST FOR NON-ACCEPTANCE OR FOR NON-PAYMENT
OF A BILL PAYABLE GENERALLY.*(Copy of Bill and Indorsements.)*

On this day of , in the year 18 ,
 I, A. B., notary public for the Province of Quebec, dwelling
 at in the Province of Quebec, at the request of
 , did exhibit the original bill of exchange, whereof a
 true copy is above written, unto E. F., the { drawee } thereof
 { acceptor, }
 personally (*or*, at his residence, office *or* usual place of busi-
 ness in), and, speaking to himself (*or* his wife, his
 clerk, *or* his servant, &c.), did demand { acceptance }
 { payment }
 thereof; unto which demand { he } answered, "
 { she }

Wherefore I, the said notary, at the request aforesaid, have
 protested, and by these presents do protest against the ac-
 ceptor, drawer and indorsers (*or*, drawer and indorsers) of
 the said bill, and other parties thereto or therein concerned,
 for all exchange, re-exchange, and all costs, damages and
 interest, present and to come, for want of { acceptance }
 { payment } of
 the said bill.

All of which I attest by my signature.

(Protested in duplicate.)

A. B.,

Notary Public,

FORM C.

PROTEST FOR NON-ACCEPTANCE OR FOR NON-PAYMENT
OF A BILL PAYABLE AT A STATED PLACE.*(Copy of Bill and Indorsements.)*

On this day of , in the year 18 ,
 I, A. B., notary public for the Province of Quebec, dwelling

at _____, in the Province of Quebec, at the request
of _____, did exhibit the original bill of exchange,
whereof a true copy is above written, unto E. F., { drawee }
the { acceptor }

thereof, at _____, being the stated place where the said
bill is payable, and there, speaking to _____, did demand
{ acceptance }
{ payment } of the said bill; unto which demand he
answered, " _____ "

Wherefore I, the said notary, at the request aforesaid, have
protested, and by these presents do protest against the accept-
or, drawer and indorsers (or drawer and indorsers) of the
said bill, and all other parties thereto or therein concerned,
for all exchange, re-exchange, and all costs, damages and
interest, present and to come, for want of { acceptance }
{ payment }
of the said bill.

All which I attest by my signature.

(Protested in duplicate.)

A. B.,

Notary Public.

FORM D.

PROTEST FOR NON-PAYMENT OF A BILL NOTED, BUT NOT
PROTESTED FOR NON-ACCEPTANCE.

*If the protest is made by the same notary who noted the bill,
it should immediately follow the act of noting and memorandum
of service thereof, beginning with the words "and afterwards,
on, &c.," continuing as in the last preceding form, but intro-
ducing between the words "did exhibit," the word "again ;"
and, in a parenthesis, between the words "written" and "unto"
the words (" and which bill was by me duly noted for non-
acceptance on the _____ day of _____ last.")*

*But if the protest is not made by the same notary, then it
should follow a copy of the original bill and indorsements and*

noting marked on the bill--and then in the protest introduce, in a parenthesis, between the words "written" and "unto," the words (" and which bill was on the day of last, by , public notary for the Province of Quebec, noted for non-acceptance, as appears by his note thereof marked on the said bill.")

FORM E.

PROTEST FOR NON-PAYMENT OF A NOTE PAYABLE GENERALLY.

(Copy of Note and Indorsements.)

On this day of , in the year 18 , I, A.B., notary public for the Province of Quebec, dwelling at , in the Province of Quebec, at the request of , did exhibit the original promissory note, whereof a true copy is above written, unto , the promisor, personally (*or*, at his residence, office *or* usual place of business, in), and speaking to himself (*or* his wife, his clerk, *or* his servant, &c.), did demand payment thereof; unto which demand { he } { she } answered. " ."

Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do protest against the promisor and indorsers of the said note, and all other parties thereto or therein concerned, for all costs, damages and interest, present and to come, for want of payment of the said note.

All which I attest by my signature.

(Protested in duplicate.)

A.B.,

Notary Public.

FORM F.

PROTEST FOR NON-PAYMENT OF A NOTE PAYABLE AT A
STATED PLACE.

(Copy of Note and Indorsements).

On this day of , in the year 18 ,
I, A. B., notary public for the Province of Quebec, dwelling
at , in the Province of Quebec,
at the request of , did exhibit the original pro-
missory note, whereof a true copy is above written, unto
 , the promisor, at , being the
stated place where the said note is payable, and there, speak-
ing to did demand payment of the said note, unto
which demand he answered : “ .”

Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do protest against the promisor and indorsers of the said note, and all other parties thereto or therein concerned, for all costs, damages and interest, present and to come, for want of payment of the said note.

All which I attest by my signature.

(Protested in duplicate.)

A, B.,

Notary Public.

FORM G.

NOTARIAL NOTICE OF A NOTING, OR OF A PROTEST FOR
NON-ACCEPTANCE, OR OF A PROTEST FOR NON-PAYMENT
OF A BILL.

(Place and date of Noting or of Protest.)

Ist.

To P. Q. (*the drawer*)

at

Sir,

Your bill of exchange for \$ dated at
the , upon E. F., in favor of C. D., payable days

U

after { sight, } was this day, at the request of
 { date, }
 duly { noted } by me for { non-acceptance. }
 { protested } { non-payment. }

A. B.,

*Notary Public.**(Place and date of Noting or of Protest.)*

2nd.

To C. D. (*indorser.*)
 or F. G.)

at

Sir,

Mr. P. Q.'s bill of exchange for \$, dated at
 the , upon E. F., in your favor (*or* in favor of C. D.),
 payable days after { sight, } and by you indorsed, was
 { date, }
 this day, at the request of duly

{ noted } by me for { non-acceptance. }
 { protested } { non-payment. }

A. B.,

Notary Public.

FORM H.

NOTARIAL NOTICE OF PROTEST FOR NON-PAYMENT OF A
NOTE.*(Place and date of Protest.)*

To ,
 at

Sir,

Mr. P. Q.'s promissory note for \$, dated at

, the , payable { days }
 { months } after date to
 { on— }

{ you } or order, and indorsed by you, was this day, at
 { E. F. }
 the request of , duly protested by me for non-
 payment.

A. B.,

Notary Public.

FORM I.

NOTARIAL SERVICE OF NOTICE OF A PROTEST FOR NON-ACCEPTANCE OR NON-PAYMENT OF A BILL, OR OF NON-PAYMENT OF A NOTE (*to be subjoined to the Protest*).

And afterwards, I, the aforesaid protesting notary public, did serve due notice in the form prescribed by law, of the foregoing pro- { non-acceptance } of the { bill } thereby test for { non-payment } { note } protested upon { P. Q., } the { drawer } personally, on { C. D., } { indorsers } the day of (or, at his residence, office, or usual place of business in) on the day of (or, by depositing such notice, directed to the said { P. Q., } at , in Her Majesty's post office { C. D., } in this city (town or village), on the day of , and prepaying the postage thereon).

In testimony whereof, I have, on the last mentioned day and year, at aforesaid, signed these presents.

A. B.,

Notary Public.

FORM J.

PROTEST BY A JUSTICE OF THE PEACE (WHERE THERE IS NO NOTARY) FOR NON-ACCEPTANCE OF A BILL, OR NON-PAYMENT OF A BILL OR NOTE.

(*Copy of Bill or Note and Indorsements.*)

On this day of , in the year 18 , I, N. O., one of Her Majesty's justices of the peace for the district of , in the Province of Quebec, dwelling at (or near the village of), in the said district (there being no practising notary public resident at or near the said village, or any other legal cause), did, at the request of and in presence of , a householder in the said district, well known unto me, exhibit

the original { bill
note } whereof a true copy is above written
unto P. Q., the { drawer
acceptor } thereof, personally (*or*, at his
promisor } residence, office or usual place of business in
) and speaking to himself (his wife, his clerk *or*
his servant, &c.), did demand { acceptance } thereof, unto
payment } which demand { he
she } answered, “ ”

Wherefore I, the said justice of the peace, at the request
aforesaid, have protested, and by these presents do protest
against the { drawer and indorsers
promisor and indorsers } of the said
acceptor, drawer and indorsers }
{ bill
note } and all other parties thereto and there in con-
cerned, for all exchange, re-exchange and all costs
damages and interest, present and to come, for want of
{ acceptance } of the said { bill
payment } note }

All which is by these presents attested by the signature of
the said (*the witness*), and by my hand and seal,

(Protested in duplicate.)

(*Signature of the witness.*)

(*Signature and seal of the J. P.*)

C. S. L. C., c. 64, sch.

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he J. P.)

COMMENTARY ON THE BILL AND NOTE ACT.

CHAPTER I.

FORM AND CHARACTERISTICS.

SECT. 1—DEFINITIONS, &C.

SECT. 2—GENERAL OBSERVATIONS.

SECT. 3—CUSTOMARY FORMS.

SECT. 1—DEFINITIONS, &C.

Bills of exchange and promissory notes are, in their inception, mere contracts, having parties thereto, as in the case of all ordinary contracts.

A Bill of exchange may be defined as a written order for the payment of money absolutely and at all events. All that one understands thereby is, however, essential. It must be in writing, and contain the signature or name of the drawer, and it must be for the unconditional payment of a specific sum of money. The order is made by a person who is called the *drawer*, and is addressed to a person who is called the *drawee*. When the latter undertakes to pay the bill, he is known as the *acceptor*, and if the bill be to pay a third person named in it, such person is known as the *payee*. And if the payee, either before acceptance or after acceptance transfer the bill by indorsement he becomes *indorser*, and so

each person who does likewise, until the bill is returned for payment. The holder is a general term applied to anyone in actual or constructive possession of the bill and entitled at law to recover or receive its contents from the parties to it. No one but such holder can maintain an action upon it.

A promissory note, or, as it is frequently called, a note of hand, is not much dissimilar. It is a written promise to pay a certain sum of money at all events and without any condition, made by one person known as the maker to another person known as the payee, who, if he indorses to a third person becomes the indorser. The moment the note is indorsed, the situation of all the parties becomes precisely similar to that of the parties to a bill. The payee, who, on the face of the note is entitled to the money which it represents, by the act of his indorsement, orders the maker to pay the indorsee. The indorser becomes, as it were, the drawer of a bill for the amount represented by the note, the maker the acceptor, and the indorsee the payee. Thus it follows that bills and notes, as respects the rights of parties, are governed by the same set of rules. This similiarity of the two forms of instruments gives rise to a current which runs through all decided cases, and is evidenced by uniformity of decision.

SECT. 2—GENERAL OBSERVATIONS.

The legal effect of drawing a bill payable to a third person is a conditional contract by the drawer to pay the payee, his order, or the bearer, as the case may be, if the acceptor do not. The effect of accepting a bill or making a note is an absolute contract on the part of the acceptor of the one, or the maker of the other, to pay the payee, or order, or bearer, as the instrument may require. The effect of indorsing is a conditional contract on the part of the indorser to pay the immediate or any succeeding indorsee, or bearer, in case of default by the acceptor or maker.

If a bill or note were to remain between the original parties, the ordinary rules applicable to cases of contract would be found sufficient for the enforcement of payment, and the final disposition of the parties one to the other. But because the quality of negotiability is not a quality of ordinary contracts those special rules which, more or less, govern every case where the rights of a party to a bill or note are brought into question, must be considered as occasion requires.

A bill or note may be made payable either to a certain person by name or other sufficient indication, or to such person or his order, or to the order of the drawer or maker, or to bearer.

When it does not contain a direction or promise to pay to the order of the payee or to bearer it is not transferable; that is so as to give to the second or any subsequent holder a right of action against the drawer or acceptor. But if, nevertheless, the payee do indorse a bill not negotiable, he is liable on his indorsement. For every indorser of a bill is in the nature of a new drawer, and therefore a blank indorsement on such a bill has been held to operate as the drawing of a bill payable to bearer. Should a note not negotiable be indorsed the indorser is liable in like manner to his indorsee.

The words or "*to his order*" or "*to bearer*" if omitted by mistake may be afterwards inserted without vitiating the instrument.

The insertion of these words in a bill or note, whether originally or subsequently, in case of error, confers upon it its negotiable character.

TRANSFER.

When made payable to bearer a simple delivery is sufficient to constitute a transfer; but when to order an indorsement is necessary. The transfer of a bill or note by indorsement may be made either before or after it becomes due. The holder acquires, in the former case, a perfect title, free from

all liabilities and objections which any parties may have had against it in the hands of the indorser: but in the latter case the instrument, according to the law of the Province of Quebec, is subject to such liabilities and objections in the same manner as if it were in the hands of the previous holder. The law of England, followed in the other Provinces, makes the indorsee liable to the equities attaching to the note itself, that is to the equities arising out of the transaction, in the course of which the bill or note was made, but not to a claim arising out of collateral matters.

Indorsements are of two sorts, full or special or blank. A full or special indorsement mentions the name of the person to whom the instrument is assigned, as "Pay A B or order." A blank indorsement consists in the simple writing of the name of the person who transfers upon the back of the note. The difference between the two in their several effects is that in the first case, the indorsee cannot transfer the instrument without himself indorsing in full or in blank, whilst in the latter case the transfer may be made by simple delivery. Thus a bill or note, when indorsed in blank, becomes substantially a bill or note payable to bearer. And yet if the payee of a note payable to bearer, or the indorsee of a note who receives it under a blank indorsement, chooses for any cause to write his name upon the back of it, as he is at liberty to do, he becomes liable as an indorser as much as if his indorsement were necessary to a transfer. One result of the foregoing principles is, that if a person steal or otherwise become wrongfully possessed of a bill or note specially indorsed he cannot negotiate it without forging the name of the indorsee; whereas if the bill or note be payable to bearer, or be indorsed in blank, he may negotiate it by mere delivery.

It is not essential to the validity of these written transfers, though called indorsements, that they be written on the back of a bill or note; they may be on its face. As no indorsement other than that by the payee can stop the negotiability of such an instrument there is no legal limit to the number

of prior indorsements that may be made. If there be no room to write them all distinctly on the back, the supernumerary indorsements may be written on a slip of paper annexed to the bill or note, called in French an "*allonge*," thenceforth part of the instrument.

As we have seen, the drawer and acceptor of a bill of exchange are both liable for its payment, and cannot divest themselves of their responsibility; but the payee or any subsequent special indorser may relieve himself of all responsibility by indorsing the bill, annexing thereto in French the words "*sans recours*," or in English "without recourse to me," or any equivalent expression. And if there be a written or even a verbal agreement between the indorser and his immediate indorsee that the latter shall not sue the former, but the acceptor only, it has been held that such an agreement is a good defence on the part of the indorser against his immediate indorsee suing in breach of the agreement.

The maker of a note is of course liable unconditionally for its payment, but the payee or any subsequent special indorser has the same privilege as is accorded to an indorser on a bill. As a general rule an indorsement may be restrictive, qualified or conditional, and the rights of the holder under such indorsement are regulated accordingly.

Any negotiable security, whether check, note or bill of exchange, indorsed in blank, may be afterwards transferred by special indorsement. The last holder may transfer it thus, either to himself or to another party by writing before or after the name of the last blank indorser the words, "Pay A. B. or order." The latter is the course generally adopted by banks in remitting bills and notes to and from their various branches, agents and correspondents.

SECT. 3—CUSTOMARY FORMS.

The law does not require a bill of exchange or promissory note to be of any particular form, but usage has adopted forms for the sake of convenience and of uniformity. When-

ever forms generally used and approved can be had for bills or notes, or for any other contracts, such forms should not be despised. A departure from them, unless for good reason, is likely to produce mischief, either because of the omission of that which is material, or the insertion of that which is illegal: and an adherence to established forms is, therefore, most strongly recommended.

They are usually, but it is apprehended not necessarily, written on paper. Parchment, linen, and any other convenient substitute for paper not being a metallic substance may, it is conceived, be made use of.

A bill or note may be written in any language, and in pencil as well as in ink. "There is," says Abbot C.J., "no authority for saying that when a law requires a contract to be in writing, that writing must be in ink. There is not any great danger that our decision will induce individuals to adopt the mode of writing by pencil in preference to that in general use. The imperfection of this mode of writing, its liability to obliteration, and the impossibility of proving it when so obliterated, will prevent its being generally adopted."

An important distinction is made between bills of exchange drawn or payable (or both) abroad, and bills the drawer and drawee of which reside in the same country. The former are termed foreign, the latter inland bills, and though governed generally by the same rules, each is subject to a number of special principles peculiar to itself.

Foreign bills of exchange are usually drawn in sets; that is, exemplars or parts of the bill are made on separate pieces of paper, each part referring to the other parts, and containing a condition that it shall continue payable only so long as the others remain unpaid. All of these the drawer is bound to deliver to the payee.

A written order upon a bank or banker for the payment of money on demand, called in practice a check, is in legal effect an inland bill. Being made payable to order or to

bearer it is negotiable in the same manner as bills or notes ; but nothing forbids its being made payable to a particular person. Checks have of late years come into such common use as to replace, in payment of any considerable amount, not only gold and silver coin, but also bank notes themselves. With their universal use there has grown up certain usages peculiar to themselves, which are now grafted on the commercial law of the country. But in so far as the application of the ordinary rules to which inland bills are subject is not inconsistent with these usages of trade, such instruments are governed thereby.

PLACE.

It is proper, though not necessary, to superscribe the name of the place where the bill or note is made.

DATE.

Neither is a date in general essential to the validity of a bill or note ; and if there be no date, it will be considered as dated at the time it was made. (1) The date expressed in the instrument is *prima facie* evidence of the time when the instrument was made. (2)

In general, a bill or note may be post-dated. (3)

SUM IN FIGURES.

The sum for which a bill is made is usually superscribed in figures ; in a note or cheque the figures are commonly subscribed. The superscription, or subscription of the sum payable is not, however, necessary, if the sum be stated in

(1) *De la Courtier v. Bellamy* 2 Show, 422. Parole evidence is admissible to show from what time an undated instrument was intended to operate, *Davis v. Jones*, 25 L. J. C. P. 91, 17 C. B. 625, S. C.

(2) *Anderson v. Weston*, 6 Bing. N. C. 296. But see *Cowie v. Harris*, 1 M. & M. 141; 4 M. & P. 722. Except when it is tendered by assignees of a bankrupt, as evidence of a petitioner's creditor's debt. *Wright v. Lawson*, 2 M. & W. 739.

(3) *Byles on Bills*, 80, cases cited.

the body of the note, but it will aid an omission in the body, as, where the word *fifty* was written in the body of the note, without the word *pounds*. (1)

TIME OF PAYMENT.

The time of payment is regularly and usually stated in the beginning of the note or bill, but, if no time be expressed, the instrument will be payable on demand. (2) The word "months," if omitted by mistake after the word expressing the time, as "three," may be inserted by the holder without vitiating the instrument (3).

The expression *after sight*, on a *bill*, means after acceptance, or protest for non-acceptance and not after a mere private exhibition to the drawee, for the sight must appear in a legal way. (4) But if a *note* is made after sight, the expression merely imports that payment is not to be demanded till it has been again exhibited to the maker (5); for a note being incapable of acceptance, the word "sight" must, on a note, bear a different meaning from the same word on a bill.

ORDER TO PAY.

The order to pay need be in no particular form; any expression amounting to an order (6), or direction, is sufficient. The word "*pay*" itself is not indispensable. Any synonymous or equivalent expression will suffice, as "*credit in cash*." (7)

PAYEE.

The payee should be particularly described, so that he cannot be confounded with another person of the same

(1) Elliot's case, 2 East., P. C. 951; 1 Leach, 175, S. C.

(2) Whitlock v. Underwood, 3 Dowl. & R. 356.

(3) Laine v. Clarke, 3 R. L. 450.

(4) See Campbell v. French, 6 T. R. 212.

(5) Holmes v. Kerrison, 2 Taunt. 323; Byies on Bills, p. 81, cases cited.

(6) Hamilton v. Spottiswood, 4 Exch. 200.

(7) Ellison v. Collingridge, 9 C. B. 570.

name, and must be a person who is capable of being ascertained at the time the instrument is made. (1) It is sufficient that the payee be so designated, though he be not named. (2) But if the bill get into the hands of a wrong payee, unless it be payable to bearer, he can neither acquire nor convey a title. One Christian drew a bill on the defendant in London, payable to Henry Davis. The bill got in the hands of another Henry Davis than the one in whose favor it was drawn, was accepted by the defendant, and by the wrong Henry Davis was indorsed to the plaintiff. Held, that the indorsement of his own name by Henry Davis was, under these circumstances, a forgery, and (*dissentiente* Lord Kenyon) could convey no title to the plaintiff. (3) If the name be spelt wrong, parole evidence is admissible to show who was intended. (4)

If there be father and son of the same name, it will be payable to the father till the contrary appear. (5) But if the son be found in possession of the note, and he indorse, that is evidence that he, and not the father, is payee (6).

If the bill be not made payable, either to any payee in particular, or the drawer's order, or to bearer in general, it would seem, according to the opinion of the majority of the judges (7), to be payable to bearer; but, according to the opinion of Eyre, C.B., in the same case, it is mere waste paper. (8) If drawn payable to a fictitious payee, and the drawer indorse the fictitious payee's name, the holder cannot, either as indorsee or bearer, recover against the acceptor (9);

(1) *Yates v. Nash*, 29 L. J., C. P. 306.

(2) *Storm v. Stirling*, 3 E. & B. 832. Also 6 E. & B. 333.

(3) *Mead v. Young*, 45 T. R. 28.

(4) *Willis v. Barrett*, 2 Stark. 29.

(5) *Sweeting v. Fowler*, 1 Stark. 106.

(6) *Stebbing v. Spicer*, 19 L. J. C. P., 24.

(7) *Minet v. Gibson*, 1 H. Bl. 608.

(8) See also *Rex v. Randall*, Russ. C. C. 185; *Rex v. Richards* 1 R. & R. C. C. 193.

(9) *Bennett v. Farrell*, 1 Camp 130.

but, if the holder's money has got into the acceptor's hands, the holder may recover it as money had and received. If the acceptor, at the time of acceptance, *knew* the payee to be a fictitious person, he may not take the advantage of his own fraud ; but a *bona fide* holder may recover against him on the bill, and declare on it as payable to bearer, or may recover on the money counts. (1)

If a blank be left for the payee's name a *bona fide* holder may fill it up with his own name, and recover against the drawer. (2) But, in order thus to charge the acceptor, the holder must show that he had authority from the drawer to insert his own name as payee. (3)

If the name of the payee do not purport to be the name of any *person*, as where a note was made payable to "Ship Fortune or bearer," it is a note payable to bearer simply. (4)

SUM IN WRITING.

The sum for which a bill is made payable is usually written in the body of the bill in words at length, the better to prevent alteration ; and, if there be any difference between the sum in the body and the sum superscribed, the sum mentioned in the body will be taken to be that for which the bill is made payable ; (5) when the figures express a larger sum than the words, evidence to show that the difference arose from an accidental omission of words, is inadmissible. (6) We have already seen, that an omission in the body will be aided by the superscription. (7)

An inaccurate, but intelligible statement of the sum payable will not vitiate. Thus, an order, or promise to pay

(1) *Minet v. Gibson*, 3 T. R. 481 ; 1 H. Bl. 569.

(2) *Cruchley v. Clarence*, 2 M. & Sel. 90.

(3) *Cruchley v. Mann*, 5 Taunt. 529 ; *Awde v. Dixon*, 6 Exch. 869.

(4) *Grant v. Vaughan*, 3 Burr. 1516.

(5) *Saunderson v. Piper*, 5 Bing. N. C. 425.

(6) *Ibid.*

(7) *Elliot's Case*, 2 East. P. C. 951.

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so many "pound," instead of "pounds," is a good bill or note. (1) A bill for "twenty-five, seventeen shillings and three," is a bill for 25l. 17s. 3d. (2)

STATEMENT OF CONSIDERATION.

There are some old cases tending to show that the words *value received* are an essential part of a bill, but it is now well settled that they are not at all material. (3)

Though the nature or particulars of the consideration appear on the bill or note, it was not necessary to state it in the declaration, or it might be stated generally as value received. "The defendant," says Maule, J., "may prove that the note was given for a different consideration, or without any consideration at all." (4)

SIGNATURE.

Without the drawer's signature, a bill payable "to my order," though accepted, is of no force (5), either as a bill of exchange or as a promissory note. (6)

The signature of the drawer or maker of a bill or note is usually subscribed in the right-hand corner; but it is sufficient if written in any other part. Thus "I. J. S., promise to pay," has been held a sufficient signature of a promissory note. (7) A man who cannot write may sign a bill by his mark. (8)

ADDRESS.

A bill of exchange being in its original a letter, should be properly addressed to the drawee. (9) But where a bill was

(1) *Rex v. Port, Bayley*, 12, 6th ed.

(2) *Phipps v. Tanner*, 5 C & P. 488.

(3) *Grant v. Da Costa*, 3 M & S. 351.

(4) *Abbott v. Hendrich*, 1 M & G. 796; *La Rocque et al. v. the Franklin County Bank*, 8 L. C. R. 328.

(5) *Goldsmid v. Hampton*, 27 L. J., C P. 286.

(6) *McCall v. Taylor*, 34 L. J., C P. 365.

(7) *Taylor v. Dobbins*, 1 Stra. 399.

(8) *George v. Surrey*, 1 M & M 516; *Collins v. Bradshaw*, 10 L. C. R. 366.

(9) *Peto v. Reynolds*, 9 Exch. 410

made payable "at No 1, Wilnot street, opposite the Lamb, Bethnal Green, London," without mentioning the drawee's name, and the defendant accepted it, he was not allowed to make the objection. (1) But a bill cannot be addressed to one man and accepted by another. (2) A bill directed to A., or in his absence to B., being accepted by A., may be declared on without taking notice of B. (3) If the word *at* precede the drawee's name, whether inserted ignorantly or fraudulently, the instrument is still a bill of exchange. (4) A bill may be directed to the drawer himself, though it is, in that case, rather a note than a bill. (5)

The direction to place to account is unnecessary. (6)

(1) *Gray v. Milner*, 8 Taunt. 739.

(2) *Davis v. Clarke* 13 L. J., Q. B. 305.

(3) *Anon*, 12 Mod. 447.

(4) *Shuttleworth v. Stephen*, 1 Camp 407.

(5) *Block v. Bell*, 1 M & Rob. 149. Cases cited Byles on Bills, 90.

(6) *Laing v. Barclay*, 1 B & C 398.

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CHAPTER II.

OF PRESENTMENT AND ACCEPTANCE.

SECT. 1—GENERAL OBSERVATIONS.

SECT. 2—PRESENTMENT FOR ACCEPTANCE.

SECT. 3—ACCEPTANCE.

SECT. 1—GENERAL OBSERVATIONS.

The legal effect of drawing a bill, payable to a third person, is a conditional contract by the drawer to pay the payee, his order, or the bearer, as the case may be, if the acceptor do not. The effect of accepting a bill, or making a note, is an absolute contract, on the part of the acceptor of the one or maker of the other, to pay the payee, or order, or bearer, as the instrument may require. The effect of indorsing is a conditional contract, on the part of the indorser, to pay the immediate or any succeeding indorsee or bearer, in case of the acceptor's or maker's default. (1)

So long as the bill remains in the ownership and possession of the payee, therefore, his undertaking is limited to the mere duty of presenting the bill for acceptance and payment within the proper time, and of giving notice to the drawer within the time prescribed by law of the refusal of the drawee to accept, or to pay the bill; on failure of either of which the drawer is exonerated from all liability on the bill. (2) But as soon as the payee indorses the bill, his undertaking assumes a much broader character and extent. The indorsement of a

(1) Byles on Bills, p. 3.

(2) *Bridges v. Berry*, 3 Taunt. 130.

bill by the payee, or by any subsequent holder, implies an undertaking from the payee, or other indorser, to the person in whose favour it is made, and to every other person to whom the bill may afterwards be transferred, exactly similar, as we have seen, to that which is implied on the part of the drawer, by drawing the bill. (1)

Where a bill is payable to the bearer, or being payable to the payee or order, it is indorsed in blank, and afterwards is transferred by the holder by mere delivery thereof, without any indorsement, such holder is not responsible thereon to the immediate party, to whom he delivers the same, or to any subsequent holder, upon the dishonour thereof; for no person, whose name is not on the bill as a party thereto, is liable on the bill, and he cannot be deemed to undertake any of the obligations of a drawer or indorser. By not indorsing it, he is generally understood to mean that he will not be responsible upon it. (2)

Every indorsement admits the signature and capacity of every prior party (3), and implies that the instrument upon which the indorser writes his name is a genuine instrument, and that he has a good right to transfer the same to the immediate indorsee. (4)

The receipt of a bill implies an undertaking, on the part of the indorsee or other holder, to every other party to the bill who would be bound to pay it, and would be entitled to bring an action on paying it, to present it in proper time, when necessary, for acceptance, and at maturity for payment; to grant no extra time, and grant no indulgence for payment; to give notice without delay to every such party of a failure

(1) *Penny v. Innes*, 1 C., M. & R. 441. See *Allen v. Walker*, 2 M. & W. 317.

(2) See *Camidge v. Allenby*, 6 B. & C. 373; *Rogers v. Langford*, 1 C. & M. 637, 642.

(3) *Lambert v. Oakes*, 1 Lord Raym. 443; 12 Mod. 244; *Free v. Hawkins*, Holt. N. P. R. 550.

(4) *Story, Prom. N. p. 123.*

in the attempt to procure acceptance or payment ; and to take all the proper steps (such as making a protest), and do all the proper acts, required by law upon such dishonour, to verify and establish the same. A default in any of these respects will discharge the parties in respect to whom there has been any such default, and who otherwise would be bound to pay the same, from all responsibility on account of the non-acceptance or non payment of the bill, and will operate as a satisfaction of any debt or demand for which it was given.

Having thus briefly considered the several rights, duties, and obligations of the parties to a bill before acceptance, let us next proceed to consider those acts, which the payee or other holder of a bill is bound to perform, before he can hold any antecedent party liable for the amount the bill is intended to represent, in case acceptance or payment thereof be refused by the drawee or acceptor.

The first of these acts, as we have already seen, is presentment for acceptance ; this will now be our subject of inquiry.

SECT. 2.—PRESENTMENT FOR ACCEPTANCE.

Presentment for acceptance is not, in all cases, necessary, for the law, taking into consideration the apparent intention of parties to a bill, has distinguished between one period for payment and another. But even when presentment may be dispensed with, mercantile usage has deemed the adoption of such a course imprudent. It is considered advisable, in every case, for the holder of an unaccepted bill to present the same to the drawee for acceptance without delay. In the event of acceptance he obtains the additional security of the acceptor, and the negotiable quality of every instrument is enhanced in proportion to the security given for its payment when due. Whilst if acceptance is refused, the antecedent parties become liable immediately. It is considered advisable, too, on account of the drawer, for by receiving early notice of dishonour, such party may, under certain

circumstances, be better able to get his effects out of the drawee's hands.

Upon all bills payable at sight, or at stated periods after sight, or after demand, or after any other event not absolutely fixed, a presentment to the drawee for acceptance is necessary in order to determine the date at which the bill is to be paid. Till such presentment there is no right of action against any party; and unless it is made within a reasonable time from the drawing of the bill, the holder will lose his remedy against any of the antecedent parties from or through whom he derived his title

What will be a "reasonable time" depends upon the circumstances of each particular case, and is a mixed question of law and fact (1); although reasonable time in general, and reasonable time for giving notice of dishonour in particular, as will be hereafter seen, is clearly a question of law.

If a bill, whether inland or foreign, is kept in circulation, and not held by any one holder, through whose hands it passes, an unreasonable time, it seems difficult to assign any particular time within which it should be presented for acceptance. In respect to foreign bills, the conveniences, if not the necessities of trade, seem to require that a very liberal allowance of time, both for the transmission and the presentment of bills, should be allowed to every successive holder. (2)

Clear and determinate usage may ascertain and fix a definite time, within which the presentment must be made, in which case such usage will undoubtedly govern.

Illness or other reasonable cause, not attributable to the misconduct or negligence of the holder, will, under certain circumstances, be a sufficient excuse for delay in making the presentment.

(1) *Muilman v. D'Equino*, 2 H. Bl. 565, and cases cited, *Byles on Bills*, 183.

(2) *Mellish v. Rawdon*, 9 Bing. 416; 2 M. & Sc. 570, S. C.

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But presentment for acceptance is not necessary in the case of bills drawn payable at a certain period after date. It is said, however, that it is incumbent on a holder who is a mere agent, and on the payee when expressly directed by the drawer so to do, to present such a bill for acceptance as soon as possible, and that for loss arising from the neglect, the payee must be responsible, and the agent must answer to his principal. (1)

In practice, however, it is usual to present for acceptance all bills drawn payable after date ; but when such presentment is made the holder is bound, in case of non-acceptance, to make protest, and to give notice thereof to the proper parties, unless otherwise authorized, in the same manner as if presentment had been required by law.

BY WHOM AND TO WHOM PRESENTMENT SHOULD BE MADE.

Let us now proceed to consider by whom and to whom the bill is to be presented for acceptance.

In general, presentment must be made, when necessary, by the holder or by some one duly authorized on his behalf. If it is not made by some person having proper authority to hold the bill the drawee is not bound to accept it. But if he does the acceptance will avail in favour of the true holder.

As to the person to whom the bill should be presented, it is obvious that it should be presented to the drawee, if he can be found or to his authorized agent. If he cannot be found, or if he refuses to accept, it should then be presented to the person, if any, to whom in case of need (*au besoin*) the holder is directed to apply. The death of the drawee or his known bankruptcy will be no excuse for the omission of presentment. In the former case the holder should inquire after his personal representative if any, and, provided he live within a reasonable distance, present it to him for acceptance ; in the latter, presentment should be made to

(1) Chit. 9th ed, 237 ; Poth. 128 ; Marius, 46.

the drawee in person, if he can be found, or to his agent, in the same manner as if the condition of his affairs were not known.

A bill drawn upon a partnership should be presented for acceptance to all or to some one of the partners, and the acceptance of one will bind all. If drawn upon two or more persons, not being partners it should be presented to each for acceptance, and if not accepted by all it may be treated as dishonoured. Acceptance will, however, be binding upon such of them as do accept.

If upon presentment the drawee is found incompetent to contract, as for example by reason of minority or coverture, the bill may be treated as dishonoured, and be protested accordingly, notice thereof being given as required to antecedent parties. The holder is not bound to take the proffered acceptance of such a drawee, and this follows from the principle of law that every bill drawn imports, as has been seen, a contract on the part of the drawer, that the drawee is a person competent to accept. Should such an acceptor refuse payment when the bill matured, no action could be maintained against him.

WHERE PRESENTMENT SHOULD BE MADE.

As to the place where presentment for acceptance is to be made, the rule is, that it must be made at either the domicile of the drawee or his place of business, without any regard to whether the bill is drawn payable generally or at a particular place specified. It is always presumed that the parties intend that the acceptance shall be at one or other of these places, whatever may be the place of payment.

If the bill is directed to the drawee at a particular place, it is to be considered as dishonoured if such party has absconded. But, if he has merely changed his place of residence, or if the bill is not directed to him at any particular place, it is incumbent on the holder to use due diligence to find him out. And due diligence is a question of fact for the jury. If the drawee has left the country, it will be sufficient to pre-

sent the bill at his last known domicile or place of business, unless he has a known agent in the same place ; for, in that case, the bill should be presented to the agent. If the drawee is dead, and is not represented, presentment must be made at his late domicile or place of business, and there be protested according to the facts. A presentment made on a legal or religious holiday will be deemed a mere nullity if not duly answered.

A question arises in this connection, consideration of which will come up more prominently at a further stage of our inquiries, at what hours during the day is presentment proper and allowable. We will discuss this question at some length when we arrive at the consideration of presentment for payment. (1)

It may be well to remark that it is of the greatest importance that the presentment of a bill for acceptance should be made in a perfectly legal manner. And, moreover, that protest should not be made without full inquiry as to whether the bill will be accepted or not. It is not sufficient in an action against the drawer for non-acceptance, to merely allege non-acceptance ; presentment for acceptance must also be alleged (2) and proved satisfactorily.

If the original drawee should refuse to accept the bill it should be presented to the drawee *au besoin*, precisely in the same way, and in the same place, and after the same inquiries, as if he were the original drawee.

WHAT TIME FOR DELIBERATION MAY BE GIVEN TO DRAWEE.

When the bill is presented, it is reasonable that the drawee should be allowed some time to deliberate whether he will accept or not. It seems that he may demand twenty-four hours for this purpose, and it is usual in such cases for the holder to leave the bill with him during that period. If

(1) *Post* page 354.

(2) *Mercer v. Southwell*, 2 Show. 180.

more than twenty-four hours be given, the holder ought to inform the antecedent parties of it, (1)

SECT. 3.—OF ACCEPTANCE.

We will now proceed to the consideration of the acceptance of bills of exchange, a duty on the part of the drawee, if he has funds appropriated for the purpose in his hands.

The drawee of a bill, unless he has for adequate consideration, expressly or impliedly engaged to accept it, is not, however, although indebted to the drawer in the full amount, or although adequate funds have been remitted to him for the express purpose, legally bound to accept, nor is he liable to any action for the consequences of his refusal; though, according to mercantile usage, such refusal would be deemed very improper. In this respect, the situation of an ordinary debtor, or agent, differs from that of a banker, who is liable on an action if he should refuse, having sufficient moneys in hand to honour the cheque of his customer; yet in case of refusal, the holder (though the drawer may withdraw his funds, or sue the drawee for the debt) has no remedy at law against the drawee or the funds in his hands(2).

Acceptance, in its ordinary signification, is an engagement by the drawee to pay the bill when due (3), in money (4). Such engagement must be absolute and unconditional, but if the holder consents to a conditional or qualified acceptance, the acceptor is bound by it. An acceptance, without any express words to restrain it, is an absolute acceptance, and renders the acceptor liable to pay the money according to the tenor and effect of the bill, unincumbered with any conditions or qualifications; this the holder is entitled to require, and he

(1) *Ingram v. Foster*, 2 Smith, 242.

(2) See *ante* pp. 100, 105.

(3) *Clark v. Cock*, 4 East, 72.

(4) *Russell v. Phillips*, 19 L. J., Q. B. 297.

is not bound to take any other. But if the drawee offers a qualified acceptance, the holder may either refuse or accept the offer. If he means to refuse it he may *note* the bill, and should give notice thereof to antecedent parties. If he intends to acquiesce in it, he must give notice of the nature of the acceptance to the previous parties, and, it would seem, must obtain their consent or they will be discharged (1); but he must not protest or note the bill, or give a general notice of dishonour, for he would thereby preclude himself from recovering against the acceptor (2).

The acceptance must be in writing upon the face of the bill or upon one of the parts of it. (3) Any written words, clearly denoting a present intention to accept or honour, will be deemed an acceptance, although the appropriate mode is to express in positive terms as, for example, "January 1, 1888. Accepted to pay according to tenor of Bill," or, "I accept to pay this bill," or simply. "Accepted." But any other words will suffice, if expressive of the same intent, or admitting of no other reasonable and just interpretation. Thus, if the drawee writes on the Bill, with or without his signature. "I will pay this bill," "I honour this bill" or simply. "Honoured," or, "Presented," it will amount to an acceptance. Again if the drawee should write on a bill "seen," or the date of the month and year, or his own signature in blank, or a direction to a third person to pay it, such circumstances would, if not otherwise explained, be deemed an acceptance of the bill.

If any conditions are annexed to an acceptance, they should all appear upon its face for it is clear that as to any subsequent holder, *bona fide*, for value, without notice, any verbal conditions would not be binding or qualify his rights.

By acceptance the drawee admits the signature and capacity of the drawer, and he cannot, after thus giving the bill currency, be admitted to prove that the signature was forged.

(1) *Rowe v. Young*, 2 B. & B. 244.

(2) *Sproat v. Matthews*, 1 T. R. 182; *Bentick v. Dorrien*, 6 East, 200.

(3) Note Act, section 4.

CHAPTER III.

OF PRESENTMENT AND PAYMENT.

SECT. 1—PRESENTMENT FOR PAYMENT.

SECT. 2—PAYMENT.

SECT. 1—PRESENTMENT FOR PAYMENT.

We have seen that acceptance imports an engagement upon the part of the acceptor, to the payee or other lawful holder of the bill, to pay the same upon due presentment at its maturity according to the tenor of the acceptance. That moreover it is incumbent upon the holder of a duly accepted bill to present the same when it becomes due to the proper person in order that it may be paid. And further that in case of non-payment the drawer and the indorsers are jointly and severally liable for the amount payable upon the bill, provided due protest is made by the holder and due notice of the dishonor given them within the time and after the manner prescribed by law. Hence it becomes important to ascertain at what time the presentment for payment ought to be made in order to bind the drawer and indorsers, and, if not duly paid, within what time the protest should be made and notice given to them respectively of the dishonor.

The contract of the acceptor is an absolute one, and is in every respect exactly akin to that entered into by the maker of a promissory note. The holder of a note is subject to the same obligations as is the like party to a bill of exchange.

We will now proceed to the consideration of the presentment of a bill or note for payment, and the person by whom and the person to whom such presentment should be made will be first considered.

BY WHOM PRESENTMENT SHOULD BE MADE.

As regards the person by whom the presentment must be made, it may be remarked that here the same general doctrine applies as in cases of presentment for acceptance. A bill or note must be presented for payment by the person entitled to receive payment upon it, or by his agent duly authorized. If the person to whom the bill had been legally transferred after acceptance is dead, the presentment must be made by his executor or administrator, if any has been appointed. If the holder has become bankrupt and assignees have been appointed, the presentment should be made by the assignees. If the holder is a woman and she marries before the bill arrives at maturity the presentment should be made by her husband, if made by her she must be authorized to act as his agent, and payment otherwise will not discharge the acceptor.

TO WHOM PRESENTMENT SHOULD BE MADE.

In the next place as to the person to whom presentment of the bill or note for payment is to be made. Here also the same general rules apply as in cases of presentment for acceptance. It must be made to the drawee or acceptor of a bill or to the maker of a promissory note. If he be abroad, presentment at his residence or office or usual place of business will be sufficient. If by reason of his absence, and not having any known residence or office or place of business, or of his death, such presentment cannot be so made it should be made at his last known residence or place of business where the acceptance, or if there be no acceptance where the instrument bears date. A personal demand on the drawee or acceptor or maker is not necessary. It is sufficient if payment be demanded at the places stated above of his wife or other agent; for it is the duty of an acceptor or maker if he is not himself present to leave provision for the payment. In case of death the bill or note should be presented to his personal representative if any is appointed, and his place is

known or can be upon reasonable inquiries. Unless indeed the bill was originally made payable at a particular place, in which case it is not necessary also to present it at the house, of the executor or administrator. If the drawee or person to whom presentment should be made has shut up his house the holder must enquire after him and attempt to find him out.

WHEN PRESENTMENT TO BE MADE.

Coming now to treat of the time when presentment is to be made, it will be necessary to consider first, how on the various sorts of bills and notes time is computed, and then on what bills and notes, and to what extent days of grace are allowed.

It has been already stated that when a bill is drawn at a certain number of days after date or after sight, those days are reckoned exclusively of the day on which the bill is drawn or accepted, and inclusively of the day upon which it falls due. The present Act provides further that "Every bill of exchange or promissory note, which is made payable at a month, or months, from and after the date thereof, shall become due and payable ~~on~~ the same numbered day of the month in which it is made payable as the day on which it is dated, unless there is no such day in the month in which it is made payable, and in such case it becomes due and payable, on the last day of that month, with the addition in all cases of the days of grace allowed by law."

We have also observed that on a bill the words "after sight" are equivalent to "after acceptance" for sight must appear in a legal way.

Upon bills and notes made payable on demand no days of grace are allowed, nor in the case of such bills is it necessary that presentment for acceptance be made apart from presentment for payment. But upon all bills or notes made payable at sight or at a stated period after sight or after date or on or after the happening of any other certain event, the law

allows three days of grace exclusive of the day on which such bills or notes become due and payable. And the present Act has provided that "With regard to bills of exchange and promissory notes, whenever the last day of grace falls on a legal holiday or non-juridical day in the Province where such bill or note is payable, then the day next following not being a legal holiday or non-juridical day in such Province shall be the last day of grace as to such bill or note." And the same statute has declared that in all matters relating to such negotiable securities the following and no other shall be observed as legal holidays or non-juridical days (1)

(a.) In all the Provinces of Canada, except the Province of Quebec—

Sundays ;
New Year's Day ;
Good Friday ;
Easter Monday ;
Christmas Day ;

The birthday (or the day fixed by proclamation for the celebration of the birthday) of the reigning Sovereign ;

The first day of July (Dominion Day), and if that day is a Sunday, then the second day of July as the same holiday ;

Any day appointed by proclamation for a public holiday, or for a general fast, or a general thanksgiving throughout Canada ; and the day next following New Year's Day and Christmas Day, when those days respectively fall on Sunday ;

(b.) And in the Province of Quebec the said days, and also—

The Epiphany ;
The Annunciation ;
The Ascension ;
Corpus Christi ;
St. Peter and St. Paul's Day ;
All Saints' Day ;
Conception Day ;

(1) Section 3.

(c.) And also, in any one of the Provinces of Canada, any day appointed by proclamation of the Lieutenant Governor of such Province, for a public holiday, or for a fast or thanksgiving within the same.

Days of grace are so called because they were formerly allowed the drawee as a favor, but the laws of commercial countries have long since recognized them as a right.

A presentment for payment before the expiration of the days of grace is premature, and will not enable the holder to charge the antecedent parties. But it is the peremptory duty of the holder to demand payment on the very day of the maturity of the bill, and even, as has been already stated, the bankruptcy or death of the acceptor or maker, before or at the time of its falling due, will not excuse or justify the omission. Neither will a declaration by the acceptor before the bill is due, that he will not pay, though made in the drawer's presence, for in such a case presentment to the one and notice of dishonor to the other is indispensable.

Bills and notes payable on demand must be presented within a reasonable time, and what is a reasonable time has been held to be a question of fact for the jury.

A man taking a bill or note payable on demand is not bound, however, laying aside all other business, to present or transmit it for payment on the very first opportunity. It has long since been decided in numerous cases, that though the party by whom the bill or note is to be paid lives in the same place, it is not necessary to present the instrument for payment till the day next after that on which it was received. If the bill must be sent by post to be presented, it ought to be posted on the day next after that on which it was received, and then the person who receives it by post, that he may present it should do so on the day next following that on which he receives it.

Such also are the general rules regulating the presentment of checks which, as has been seen, are really bills of exchange (1);

(1) *Ante* page 134.

but as checks on bankers are now extremely common, it has been thought convenient to discuss the presentment of such instruments more in detail in the chapter relating to checks.

A common promissory note payable on demand differs from a bill so payable in this respect, the bill is evidently intended to be presented and paid immediately, and the drawer may have good reason for desiring to withdraw his funds from the control of the drawee without delay; but a common promissory note payable on demand is very often originally intended as a continuing security, and afterwards indorsed as such. Indeed it is not uncommon for the payee, and afterwards for the endorsee, to receive from the maker interest, periodically, for many years on such a note. And sometimes the note is expressly made payable with interest which clearly indicates the intention of the parties to be that though the holder *may* demand payment immediately, yet he is not bound to do so. It is therefore thought that a common promissory note payable on demand, especially if made payable with interest, is not necessarily to be presented the next day after it has been received, in order to charge the indorser; and that when the indorser defends himself on the ground of delay in presenting the note, it will be a question for the jury whether under all the circumstances the delay was or was not unreasonable.

Bank notes differ again from other promissory notes in this that they are intended to pass from hand to hand, and are issued that they may circulate as money returning to the Bank as seldom as possible, but they are not intended as a continuing security in the hands of any one holder. Therefore a man who takes bank notes in payment must present them or forward them for presentment the day after he receives them, in order to enable him in the event of the bank failing to sue the person from whom they were received, on the consideration of what was given for them. But as it would be inconsistent with the very nature and design of such notes that every man who takes them should present them

for payment, it is sufficient to exonerate the taker from the charge of laches, if he circulated them within the time in which he ought otherwise to have presented them, and without circulating them, it would seem that if, according to the course of business, it is usual to retain such notes, a reasonable time that may be an excuse for omitting instant presentment. (1)

In the previous chapter we left an important question to be considered when we came to treat of presentment for payment. (2) At what hours during the day is presentment proper and allowable?

Presentment, both for acceptance and payment, when made at the place of business of the drawee or acceptor, must be made during the usual hours of business, and if at a banker's, either within or after the usual hours of banking.

It has been decided that business hours, except in the case of bankers, range throughout the whole day down to the hours of rest in the evening. But this must be taken with the *proviso* that there is some person there who is authorized to accept or pay, or to make refusal. If presented at the dwelling house of the acceptor or maker, it must be within the hours at which the family are up and the acceptor or maker may reasonably transact business. Presentment at any other time than during the hours stated above will be a mere nullity and without any legal effect. Where a bill or note was made or accepted, payable at a particular place, it was formerly a point much disputed whether a presentment at that place was necessary in order to charge the acceptor, maker or other parties. At length it was decided in the House of Lords that an acceptance, payable at a particular place was a qualified acceptance, rendering it necessary in an action against the acceptor to aver and prove presentment at such place. This decision occasioned the passing of the first and second Geo.

(1) But see this question discussed *ante* CHAP. IV., p 148.

(2) *Ante* page 348.

IV, c. 78, by which it is enacted that an acceptance payable at a particular place is a general acceptance unless expressed to be payable there only and not otherwise or elsewhere.

On this statute it has been decided that an acceptance is general, though the bill be made payable at a particular place by the drawer and not by the acceptor.

The provisions of this enactment apply to Ontario (1) and Prince Edward Island (2), the Act so providing. But in Quebec, according to the Civil Code of Lower Canada a bill or note is only considered to be payable generally if no particular place of payment is specified. If either by the original tenor of the bill or by a qualified acceptance a particular place is specified, presentment must be made at such place. (3)

The consequence of not duly presenting a bill or note is that all the antecedent parties are discharged from their liability whether on the instrument itself or on the consideration for which it was given.

The acceptor or maker, however, still continues liable. And indeed presentment is not in general necessary for the purpose of charging him, the action itself being held to be a sufficient demand, and that though the instrument be made payable on demand. (4) But if a bill or note be payable at or after sight it must be presented in order to charge the acceptor or maker, so must a note payable at a particular place as we have just seen. But though the absence of demand be in general no defence, yet if the acceptor or maker pays on action brought without any previous demand, it seems the Court would, where it has the power, take the question of costs into consideration.

(1) Section 16.

(2) Section 9.

(3) C. C. L. C. Art 2307.

(4) *Rice v. Bowker et al*, 3 L. C. R. 305. Even if made payable at a certain place. *Ibid*. But a maker may allege and prove that at the time he was ready with funds to pay if demand had been made. *Mount v. Dunn*, 4 L. C. P. 348.

SECT. 2—PAYMENT.

Payment should be made to the true holder of the bill or note ; for payment to any other party is no discharge to the acceptor or maker, unless, indeed, the money paid finds its way into the holder's hands, and the holder has treated it as received in liquidation of the bill. (1).

There are some cases in which payment to a wrongful holder would be protected, and others in which it would not. If a bill or note, payable to bearer, either originally or by a blank indorsement, be lost or stolen, the *bona fide* holder may compel payment. And such payment may be made so as to discharge the maker or acceptor, (2) provided it is not made with knowledge or suspicion of the infirmity of the holder's title, or under circumstances which might reasonably awaken the suspicion of a prudent man.

For it is a general rule that where one of two innocent parties must suffer from the acts of a third, he who has enabled such third person to occasion the loss must sustain it. (3)

Payment before the bill or note is due or long after it is due, or in case of a check long after it is drawn, or when the marks of cancellation are on the instrument, are examples of payment out of the usual course of business.

And, therefore, though a cheque be really drawn by a banker's customer, but torn in pieces before circulation by the drawer with intention of destroying it, and a stranger, picking up the pieces, pastes them together, and presents the check soiled and so joined together to the banker, and he pays it, the banker cannot charge his customer with this payment, for the instrument was cancelled, and carried with it reasonable notice that it had been cancelled. (4)

(1) *Field v. Carr*, 5 Bing. 13.

(2) *Smith v. Sheppard*, Sel. Ca. 243.

(3) *Lickbarrow v. Mason*, 2 T. R. 70.

(4) *Scholey v. Ramsbottom*, 2 Camp. 485.

If the bill or note be not payable to bearer, but transferable by indorsement only, and be paid to a party whose title is made through the forged indorsement, the payer is not discharged. (1)

If a bill or note be paid before it is due, and is afterward indorsed over, it is a valid security in the hands of a *bona fide* indorsee. "I agree," says Lord Ellenborough, "that a bill paid at maturity cannot be re-issued, and that no action can be afterwards maintained upon it, by a subsequent indorsee. A payment before it comes due, however, I think, does not extinguish it any more than if it were merely discounted. A contrary doctrine would add a new clog to the circulation of bills and notes, for it would be impossible to know whether there had not been an anticipated payment of them." (2)

If an acceptor discount his own acceptance, he may transfer it, and the indorsee will be liable to a subsequent holder, even with notice. (3) But if the acceptor is the holder when the bill falls due, it is extinguished.

If the bill be paid, the payer has a right to insist on its being delivered up to him; but if it be not paid the holder should keep it. Yet it has been held that an agent is justified by the usage of trade, in delivering it up on receiving a cheque, though that cheque is afterwards dishonoured. (4) But the drawers or indorsers in such a case would be discharged, for they have a right to insist on the production of the bill, and to have it delivered up on payment by them. (5) If the holder of a cheque receive Bank notes instead of cash, and the Bank fail, the drawer is discharged. (6) If bonds

(1) *Smith v. Mercer*, 6 Taunt, 76.

(2) *Burbidge v. Manners*, 3 Camp. 193.

(3) *Attenborough v. Mackenzie*, 25 L. J., Exch. 244.

(4) *Russell v. Hankey*, 6 T. R. 12.

(5) *Powell v. Roche*, 6 Esp. 76.

(6) *Vernon v. Bouverie*, 2 Show. 296.

be accepted in payment, the payment is good even though they prove to be valueless. (1)

A set-off does not amount to payment, unless it be mutually agreed that one demand shall be set off against the other. Such an agreement, even by one of several partners, with a debtor to the firm that a separate debt due from the partner shall be set off against a joint debt due to the firm, binds the firm. (2) Credit given to the holder of a bill by the party ultimately liable is tantamount to payment. (3) Where a banker takes from a customer and his surety a promissory note, intended to secure a running balance, and makes advances on the faith of the note, it is not discharged by subsequent unappropriated repayments made by the customer to the banker, but still continues as security for the existing balance. (4)

If the drawee discover, after payment, that the bill or cheque is a forgery, he may in general, by giving notice in the same day, recover back the money. And if he have paid the bill with the understanding that he was to receive it back, and do not, he may bring an action to retract the the payment. (5) And an indorser may sue on a bill which he has been induced by fraud to pay on behalf of the party liable. (6)

Money paid under a mistake of law cannot be recovered back ; (7) but money paid under a mistake of fact, or even in forgetfulness of a fact, may be recovered back. (8) Payment of a bill accepted under a mistake of fact is money paid under such mistake, and can be recovered back. (9)

(1) *Schraeder's case*, L. R., 11 Eq. 131.

(2) *Wallace v. Kelsall*, 7 M. & W. 264.

(3) *Atkins v. Owen*, 4 Nev. & Man. 123.

(4) *Pease v. Hirst*, 10 B. & C. 122.

(5) *Alexander v. Strong*, 9 M. & W. 733.

(6) *Bell v. Buckley*, 11 Exch. 631.

(7) *Kitchen v. Hawkins*, Law Rep. 2 C. P. 22.

(8) *Kelly v. Solari*, 9 M. & W. 54.

(9) *Kendall v. Wood*, L. R., 6 Ex. 243 ; 39 L. J. 167.

Money laid down on the counter by a banker's cashier in payment of a cheque cannot be recovered back by action, though it were handed over under a misapprehension of the state of the drawer's account ; still less can it be taken back by force from the party receiving it. (1) A banker's counter is in the nature of a neutral table, provided for the use of both banker and customer. As soon as the money is laid down by the banker upon the counter, to be taken up by the receiver the payment is complete. (2)

(1) *Chambers v. Miller*, 21 L. J., C. P. 30 ; *Pollard v. Bank of England*, L. R., 6 Q. B. 623.

(2) *Chambers v. Miller*; *supra*.



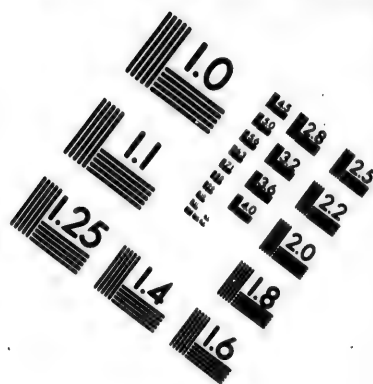
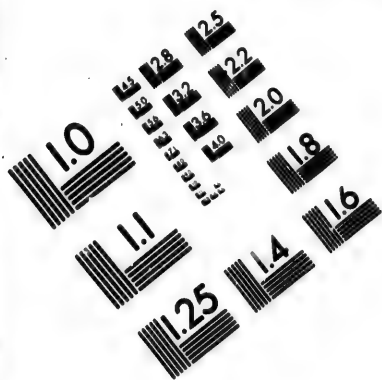
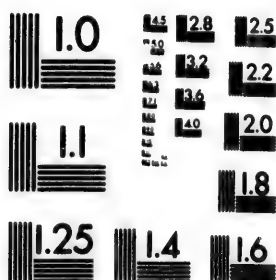


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CHAPTER IV.

OF PROTEST AND NOTICE OF DISHONOUR.

SECT. 1.—PROTEST FOR NON-ACCEPTANCE.

SECT. 2.—PROTEST FOR NON-PAYMENT.

SECT. 3.—NOTICE OF DISHONOUR.

SECT. 1.—PROTEST FOR NON-ACCEPTANCE.

Upon the dishonour of a bill of exchange by the refusal of the drawee to accept it, it is in general the indispensable duty of the holder to have the bill duly protested, and notice thereof given to the antecedent parties to whom he looks for reimbursement and indemnity. If he neglects so to do the antecedent parties are discharged, and are not liable for subsequent non-payment. (1) There is no difference in this respect whether the bill be payable at a certain time after date or after sight; for although the former class of bills are not required to be presented except at maturity, yet as we have seen if such a bill is actually presented for acceptance and dishonoured, the antecedent parties have a right to a protest and notice thereof.

A protest is in form a solemn declaration written under a fair copy of the bill, stating that acceptance has been demanded and refused, the reason if any assigned, and that the bill is therefore protested. When the protest is made for a qualified acceptance, it must not state a general refusal to accept, otherwise the holder cannot avail himself of the qualified acceptance.

(1) *Roscow v. Hardy*, 12 East, 434.

According to the Civil Code of the Province of Quebec the holder of any bill of exchange, however, instead of making protest, may at his option cause it to be *noted* for non-acceptance, and when the bill is so noted he is not bound to give notice of the same in order to hold any party liable thereon. (1) Noting is a minute made on the bill (2) by the proper person at the time of the refusal to accept. It consists of his initials, the month, the day, the year, and his charges for so minuting. (3) It is considered in general as a preparatory step to protest, which latter may be drawn up and completed at any time before the commencement of the suit, or even before or during the trial, and ante-dated accordingly.

When a bill which has been noted for non-acceptance is afterwards protested for non-payment, a protest for non-acceptance need not be extended, but the noting with the date thereof and the name of the notary by whom the same was made must be stated in the protest for non-payment. (4)

The noting and protesting of bills and notes, whether for non-acceptance or for non-payment, and the giving notice thereof, are done by the ministry of a single public notary without witnesses in the manner and form prescribed by law. In case there is no notary in the place where the dishonour occurred, or the only notary is unable or refuses to act, any Justice of the Peace may make the required noting and protest, and give notice thereof, but the protest must set forth the reasons why the same was not made by the ministry of a notary. (5)

No clerk, teller or agent of any Bank may act as a notary in the protesting of any bill or promissory note, payable at the Bank, or at any of the agencies of the Bank, in which he is employed. (6)

(1) C. C. L. C. Art. 2302.

(2) C. C. L. C. Art. 2301.

(3) See FORM A., *ante* p. 319.

(4) See FORM D., *ante* p. 321; C. C. L. C. Art. 2300, 2302.

(5) See FORM J., *ante* 325; C. C. L. C. Art. 2304.

(6) Section 11.

The duplicate protest and notice with a certificate of service, and all copies thereof attested by the signature of the notary or of the Justice of the Peace, as the case may be, are *prima facie* evidence of the facts contained therein. (1)

Upon due notice of protest for non-acceptance to the parties liable upon the bill, the holder may demand immediate payment of it from such parties in the same manner as if the bill had become due and had been protested for non-payment. And after such protest and notice he is not bound to present the bill for payment or if it be so presented to give notice of the dishonour. (2)

To the general rule that protest and notice is necessary to bind antecedent parties, there are certain exceptions which are entirely consistent with the reason on which it is founded. One is where the drawer or indorser has agreed or requested that in case of dishonor it should be returned without protest, in order to save expense. Another is where the drawer has no effects in the hands of the drawee, and therefore can have no reasonable expectations that the bill will be honoured. And a third is where the drawer has admitted his liability by a promise to pay. "By the drawer's promise to pay," says Lord Ellenborough, "he admits the existence of everything which is necessary to render him liable. When called upon for payment he ought to have objected that there was no protest. Instead of this he promises to pay it. I must therefore presume he had due notice, and that a protest was regularly drawn up by a notary."

But in all such cases of exception and excuse, the effect is strictly limited to those parties who have made such an agreement, or who stand in the peculiar predicament pointed out by the nature of the acceptance, and it does not extend to other parties.

The question as to the manner in which notice of dishonor

(1) Section 10; C. C. L. C. Art. 2305.

(2) C. C. L. C. Art. 2298.

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should be given, we will discuss when we come to consider notice of protest for non-payment.

SECT. 2—PROTEST FOR NON-PAYMENT.

We will now proceed to consider the obligations and duties of the holder of a bill or note upon its dishonour, by reason of non-payment either in whole or in part. And these may be compressed under two heads: (1) The obligation or duty to make a due protest for non-payment; and (2) that of giving due notice of the dishonour to the other parties upon the bill or note, who may be liable to pay him the amount, in case of its dishonour.

In the first place, then, it is ordinarily indispensable that a protest should be made immediately upon the dishonour, according to the course prescribed by law therefor. By the law of this country the protest may be made in the afternoon of the last day of grace (1) at the place where the bill or note is due.

If part payment only is made by the acceptor protest should be made, and due notice given exactly as in other cases, stating the facts.

SECT. 3—NOTICE OF DISHONOUR.

In general it is incumbent on the holder of a bill or note dishonoured, whether by non-acceptance, or by non-payment, to give notice of that fact to the antecedent parties. The requisites of notice and the consequences of neglect being much the same in both cases, under the general head of notice of dishonour will be considered notice of non-acceptance and notice of non-payment.

In considering this subject, let us inquire,—first, what form of notice is required; secondly, how notice is to be transmit-

(1) Section 22; C. C. L. C. Art. 2306.

ted ; thirdly, at what place it is to be given ; fourthly, at what time ; fifthly, by whom it must be given ; sixthly, to whom ; and lastly, what are the consequences of neglect.

FORM OF NOTICE.

First, as to the form of notice required. And here it must be premised that notice does not mean mere knowledge, but an actual notification. For a man who can be clearly shown to have known beforehand that the bill or note would be dishonoured is nevertheless entitled to notice when such dishonour occurs. (1)

No particular form of words is required in giving notice of the dishonour of a bill or note, but the language used must be such as to apprise the party liable of the dishonour (*i.e.*, of presentment and non-acceptance or non-payment), and to intimate that he is expected to pay it. An announcement of the dishonour will, however (at least if it come from the holder), amount to a sufficient intimation to the indorser that the holder looks to him for payment. (2) But a mere demand of payment, unaccompanied with notice of dishonour, will not be sufficient. From the decisions it would seem that but slight difference exists between what would be deemed a sufficient notice, and what would be considered insufficient, it therefore is hardly safe to give notice of dishonour without professional aid.

The notice must not so describe the instrument that the defendant may be led to confound it with some other. But if there is more than one bill to which the notice can apply, it lies on the defendant to prove that fact. (3) So long as the misdescription does not mislead it is immaterial, and this is a rule of convenience and justice, as well as of law. (4) If a

(1) See *Burgh v. Legge*, 5 M. & W. 418 ; *County v. Thompson*, 18 L. J. ; C. P. 127 ; 7 C. B. 400, S. C.

(2) *Furze v. Sharwood*, 2 G. & D. 116.

(3) *Shelton v. Braithwaite*, 7 M. & W. 436.

(4) See *Thompson v. Cotterall*, Q. B. (U.C.) 185 ; *Low v. Owen*, 12 C. P. (U.C.) 101 ; *Thorn v. Sandford*, 6 C. P. (U.C.) 462.

note is improperly called a bill it is no objection, (1) nor if a bill is improperly called a note, (2) nor yet if the character of drawer and acceptor is transposed. (3)

It has been held in England that notice of dishonour need not state on whose behalf payment is applied for, not where the bill is lying (4) and a misdescription of the place where the bill is lying is immaterial (5), unless, perhaps, a tender were made there.

If the notice, by mistake, misdescribe the person giving it, by representing that it is given by or on behalf of A., when in reality it is given by or on behalf of B., it is, nevertheless, good. But the party who receives the notice is to be placed in the same position as if the notice had really been given by A., and is at liberty to object any inability in A. to give notice; as, for example, that A. had no right of action on the bill. (6)

The notice need not in any case contain *a copy* of the protest.

TRANSMISSION OF NOTICE.

Secondly, as to the mode of transmitting the notice of dishonour. The most common and the safest mode of giving notice is by forwarding it by post, and it is in such case unnecessary to prove that the letter was received, for any miscarriage will not prejudice the person giving the notice.

Where a witness said that the letter containing notice of dishonour was put on a table to be carried to the post office, and that by the course of business all letters deposited on this table were carried to the post office by a partner, Lord Ellenborough said: "You must go further; some evidence

(1) *Messenger v. Southey*, 1 Man. & Gr. 76.

(2) *Stockman v. Parr*, 11 M. & W. 809.

(3) *Mellish v. Rippen*, 7 Exch. 578.

(4) *Woodthorpe v. Lawes*, 2 M. & W. 109; *Maxwell v. Brain*, Exch. 1866; but such is not the law in Ontario, *Clarke on Bills*, 133.

(5) *Rowlands v. Sprinnett*, 14 L. J., Exch. 227; 1 M. & W. 7, S. C.

(6) *Harrison v. Ruscoe*, 15 L. J., Exch. 110, 15 M. & W. 231, S. C.

must be given that the latter was taken from the table in the counting house and put into the post office. Had you called the porter, and he had said that, although he had no recollection of the letter in question, he invariably carried to the post office all the letters found upon the table, this might have done, (1) but I cannot hold this general evidence of the course, of business, in the plaintiff's counting house, to be sufficient." (2) The post marks in town or country proved to be such are evidence that the letters, on which they are, were in the office to which those marks belong at the time of the dates of such marks. (3) But they are not conclusive evidence. (4)

PLACE.

Thirdly, as to the place at which notice is to be given.

A notice of dishonour will be deemed to be sufficiently given, if it is addressed, in due time, to any party entitled to such notice, at the place at which the bill or note is dated, unless any such party has, under his signature, on the bill or note, designated another place. In this latter case notice will be sufficiently given if addressed to him, in due time, at such other place. Any notice addressed as above will be deemed sufficient, although the place of residence of the party thus sought to be notified is other than either of such places. (5)

TIME.

Fourthly, as to the time when notice of dishonour should be given.

The general rule is that notice must be sent to each of the parties to the bill or note, at any time during the day whereon such protest has been made, or the next juridical

(1) *Skilbeck v. Garbett*, 14 L. J., Q. B. 388.

(2) *Hetherington v. Kemp*, 4, Camp. 194.

(3) *Kent v. Lower*, 1 Camp. 177, Byles 283.

(4) *Stocken v. Collin*, 7 M. & W. 519; 9 C. & P. 653.

(5) Section 5.

day following; and any notice will be deemed to have been duly served upon the person to whom the same is addressed if it is deposited in the post office nearest to the place of making the presentment. (1) This is provided for in the Act as being applicable to Ontario. In the Province of Quebec notice may be served any time within the three days next following the day of protest. (2) As to what will be due time in the giving of any notice elsewhere in Canada than in the above Provinces, will be a question of law depending on the facts of each particular case. But the same rules which we find provided for by the Act in respect to the Province of Ontario may be taken as applicable to the whole Dominion, exclusive of Quebec, and should be followed in order to avoid any doubt as to the sufficiency of notice.

While it is usual for the holder to have notice sent upon dishonour to all the parties liable on the bill or note, his duty will have been duly fulfilled if he notifies the immediate party from whom he had received the bill or note. In such case all other parties will be released from any liability to *him*. But upon receipt by the party to whom notice has been sent such party may transmit, in due time after receipt of notice by him, a notice to any or all of the parties from or through whom he received the bill or note, and whose names appear before his on the back of the instrument. In fine any party liable on a bill or note may hold the immediate holder from whom he received it, upon giving such party notice of dishonour within the delay prescribed by law after notice received by him.

It may indeed be doubted, however, whether any party other than the actual holder at the moment of protest, has in the Province of Quebec, three days within which to transmit a notice of such protest to antecedent parties.

(1) Section 23; *Wilson v. Pringle*, 14 Q. B. (U.C.) 230; *Bank of B. N. A. v. Ross*, Q. B. (U.C.) 199; *Com. Bank v. Eccles*, 4 Q. B. (U.C.) 336.

(2) C. C. L. C. Art. 2330.

When a bill or note is in the hands of an agent, as an attorney or Bank, he is considered as a separate party as regards time for giving notice and consequently he has a day to give notice to his principal, and the latter another day to give notice to the antecedent parties. (1)

BY WHOM NOTICE TO BE GIVEN.

Fifthly, we are to consider by whom the notice ought to be given.

The object of notice is twofold: First, to apprise the party to whom it is addressed of the dishonour; and, secondly, to inform him that the holder, or party giving the notice, looks to him for payment. Hence it follows that notice can only be given by some party to the instrument, though he need not be the *actual holder* of the bill at the time but that a stranger is incompetent to give it. And it has been held by Lord Eldon, that notice by the first indorsee, who had not himself received notice from the second indorsee, and who was not, therefore, obliged to take back the bill, was insufficient as between the second indorsee and the drawer. (2) And it seems clear that even a party to the bill, who has been already discharged by laches, or who could not in any event sue, is incompetent to give notice. (3) But a prior indorsee who has himself received due notice may transmit it (4), though he may not know that the bill has been dishonoured. (5) And the notice by the holder, or by a party who is liable to be sued and may be entitled to sue, will enure to the benefit of all antecedent or subsequent parties. So that a notice by the last indorsee to the drawer will operate as a notice from each indorser to the drawer;

(1) *Ralson v. Bennett*, 2 Taunt, 388.

(2) *ex parte Barclay*, 7 Ves. 597; but *quære*, since *Chapman v. Keane*, 3 Ad. & E. 193; 4 N. & M. 607, S. C., unless the party giving the notice had been already discharged by laches.

(3) *Harrison v. Ruscoe*, 15 L. J., Exch. 110.

(4) *Jameson v. Swinton*, 2 Camp. 373; 2 Taunt. 224, S. C.

(5) *Jennings v. Robert*, 24 L. J., Q. B. 102; 4 E. & B. 615, S. C.

and if the payee or first indorser has duly received notice, or has not been discharged by laches, a notice by him to the drawer will be equivalent to a notice from each indorser and from the holder to the drawer. (1) And a notice from an intermediate party may, in pleading, be described as a notice from the plaintiff. (2)

Notice of dishonour may be given by any agent who holds the bill as a banker or attorney, and in the agent's own name. (3) And it has been held that a notice given by a party to a bill in the name of an indorser, but without his authority, is good. (4)

A creditor who holds a bill as a collateral security is bound to present and give notice of dishonour, and is liable for the consequences if he omit to do so (5).

TO WHOM NOTICE TO BE GIVEN.

Sixthly, to whom notice is to be given.

Each indorser is entitled to notice. The drawer of a bill payable to a third party is also entitled to notice. The drawee or acceptor is not entitled, nor is the maker of a promissory note.

It is the safest course for the holder to give notice himself to all the parties against whom he may wish to proceed within the time within which he is, by law, required to give it to his immediate indorser (6); for, if he merely give notice to his immediate indorser, and it be not regularly transmitted to the antecedent parties, they are discharged: and, even if it be so transmitted, the evidence required to trace the notice back to a remote party is more voluminous, and may be

(1) Byles on Bills, 291.

(2) *Newen v. Gill*, 8 C. & P. 367.

(3) *Woodthorpe v. Lawes*, 2 M. & W. 109; *Rowe v. Tipper*, 13 C. B. 249; *Wilson v. Pringle*, 14 Q. B. (U. C.) 230.

(4) *Rogerson v. Hare*, 1 Jur. 1.

(5) *Peacock v. Pursell*, 14 C. B. N. S. 728; 32 L. J., C. P. 266, S. C.

(6) *Rowe v. Tipper*, 13 C. B. 249.

difficult to procure. But if, where there are several indorsements, notice of the dishonour be given by the holder to his immediate indorser, and to him only; but an unbroken chain of notices, each given in due time, hang regularly from indorsee to indorser, back to a distant indorser or to the drawer, the latter is liable either to his indorser or to the holder.

As notice may be given by leaving it at the counting house, so notice to an agent for the general conduct of business is sufficient notice to the principal. (1) But notice to a man's attorney or solicitor is not sufficient. (2) A verbal message left at the drawer's house with his wife has been held sufficient. "A person, not a merchant," says Bolland B., "who draws a bill of exchange, undertakes to have some one at his house to answer any application that may be made respecting it when it become due." (3)

If the drawer of a bill become bankrupt, notice must nevertheless be given to him, whether a trustee have been appointed (4) or not. If the bankrupt have absconded, there being as yet no assignees, and a messenger be in possession, notice should be given to the messenger, and to the petitioning creditor.

If the party be dead, notice should be given to his personal representatives, and if there be no personal representatives, a notice sent to his late residence is sufficient. (5)

Where partners are jointly liable on the bill, notice to one is sufficient. (6) And where a note is made payable to and indorsed by several persons, though not in partnership, notice to one is notice to all. (7)

(1) *Crosse v. Smith*, 1 M. & Sel. 545.

(2) *Ibid.*

(3) *Honsego v. Cowne*, 2 M. & W. 348.

(4) See cases cited in *Bytes on Bills*, p. 294.

(5) *Merchants Bank v. Birch*, 17 John's Rep. 25.

(6) *Porthouse v. Parker*, 1 Camp. 83; *Bignold v. Waterhouse*, 1 M. & Sel. 259.

(7) *Bank of Michigan v. Gray*, 1 Q. B. (U.C.) 422.

A man making a bill, guaranteeing the payment of a bill, but not a party to it, is not discharged, by the neglect of the holder to give him notice of dishonour unless he has been actually prejudiced by such neglect. (1)

And though a man indorse a bill, yet if he also give a bond conditioned for its payment, absence of due notice of dishonour is no plea to an action on the bond. (2)

CONSEQUENCES OF NEGLECT TO GIVE NOTICE.

Let us now inquire, seventhly, what are the consequences of neglect to give due notice. The law presumes that, if the drawer has not had due notice, he is injured, because, otherwise, he might have immediately withdrawn his effects from the hands of the drawee; and that, if the indorser has not had timely notice, the remedy against the parties liable to him is rendered more precarious. The consequence, therefore, of neglect of notice is, that the party to whom it should have been given is discharged from all liability, whether on the bill or on the consideration for which the bill was paid. (3)

The old doctrine on this subject was, that it lay on the defendant to prove that he had been injured by the want of notice; but it is now settled that the want of notice is a complete defence, and that evidence tending to show the defendant was not prejudiced by the neglect is inadmissible except in an action against the drawer who held no effects in the hands of the drawee. (4) And if a man who is discharged for want of notice nevertheless pays the bill, he cannot recover against prior parties.

WAIVER OF NOTICE.

Notice may be dispensed with and excused by a prior agreement on the part of the party otherwise intitled to it

(1) *Warrington v. Furbar*, 8 East 142.

(2) *Murray v. King*, 5 B. & Ald. 165.

(3) *Bridges v. Berry*, 3 Taunt, 130.

(4) *Dennis v. Morrice*, 3 Esp. 158.

that it shall not be necessary to give him notice. Thus, where the drawer stated to the holder a few days before the bill became due that he would call and see of the bill had been paid by the acceptor, it was held that he had dispensed with notice. (1)

Where the drawer has countermanded payment, notice of dishonour to him is dispensed with, although it may be still necessary to present. (2)

If the drawer has no effects at any time during the currency of the bills in the hands of the acceptor, and will have no remedy against the acceptor or any other person if he be obliged to pay the bill, he cannot, in general, have been prejudiced by want of notice, and, therefore, cannot set that up as a defence. (3) But this decision, substituting knowledge for notice, has been much regretted.

Ignorance of a party's residence will excuse neglect to give notice of dishonour. So long as that ignorance continues without neglecting to use the ordinary means for acquiring information.

Nemo ad impossibile tenetur; and, therefore, it would seem, on general principles, that the death or dangerous illness of the holder or his agent, or other accident not attributable to the holder's negligence rendering notice impossible, may excuse it. (4) But where an indorser left home on account of the dangerous illness of his wife, at a distance, and a letter containing notice of dishonour of a bill lay unopened at his shop during his absence, till after the proper time for giving his indorser notice, Lord Ellenborough held that these circumstances afforded no excuse for the delay (5)

Where a bill is drawn by several persons upon one of themselves, since the acceptor is likewise a drawer, notice of

(1) Byles on Bills, cases cited p. 298.

(2) Hill v. Heap, D. & R. N. P. C. 57.

(3) Wirth v. Austen L. R., 10 C. P. 689.

(4) C. C. L. Art. 2324.

(5) Turner v. Leach, Chit, 9 ed. 330.

dishonour is superfluous as the dishonour must be known to one of them, and the knowledge of one is the knowledge of all. (1)

(1) *Porthouse v. Parker*, 1 Champ. 82. But see *Bignold v. Waterhouse*, 1 M. & Sel. 259.

CHAPTER V.

OF THE ALTERATION AND FORGERY OF A BILL OR NOTE.

SECT. 1—OF THE ALTERATION OF A BILL OR NOTE.

SECT. 2—OF THE FORGERY OF A BILL OR NOTE.

SECT. 1—OF THE ALTERATION OF A BILL OR NOTE.

A bill of exchange or promissory note is voided by an alteration in a material part, made while it is in the custody of the plaintiffs, although that alteration be by a stranger, unless all parties consent thereto. (1) For a person who has the custody of an instrument is bound to preserve it in its integrity. And as it would be avoided by his fraud in altering it himself, so it will be avoided by his *laches* in suffering another to alter it. It is held in the United States however, that an alteration by a stranger, though material, will not render the instrument inoperative.

Where a bill was drawn payable to A. B., and whilst in his possession the date was altered, and the bill was subsequently indorsed to the plaintiffs for value, it was held that they could not recover against the acceptor. "It seems admitted," says Ashurst, J., "that if this had been a deed, the alteration would have vitiated it. Now, I cannot see any reason why the principle on which a deed would have been avoided should not extend to a case of a bill of exchange. There is no magic in parchment or wax, and the principle to

1 Davidson v. Cooper, 11 M. W. 778, 13 M. & W. 343.

be extracted from the cases is, that any alteration voids the contract. If A. B. had brought this action, he could not have recovered, because he must suffer from any alteration of the bill whilst in his custody ; the same objection must hold against the plaintiffs, who derive title from him." (1)

So, where the drawer, *without the consent of the acceptor*, added to the acceptance the words, "Payable at Mr. B's, Chiswell street," it was held that this was a material alteration, discharging the acceptor. (2)

But it has been held by the same learned judge (3) and by the court of exchequer, that a similar addition, *with the consent of the acceptor*, would not invalidate the instrument. Where a bill was addressed to A. B. & Co., and the acceptance was by A. and B., and the address was afterwards altered to correspond with the acceptance, as the acceptors would be liable either way, the alteration was held to be immaterial. (4) An alteration of a foreign bill, by adding either on the face of the bill or to the indorsements the rate of exchange, according to which the bill is to be paid, is fatal. (5)

The addition of the words "interest to be paid at six per cent. per annum," written at the *corner* of the note, and not in the body, is a material alteration avoiding the note. (6)

There are, however, two cases in which an alteration, though in a material part, will not vacate the instrument ; first, where such an alteration is made before the bill is issued, or become an available instrument ; and secondly, where the bill is altered to correct a mistake, or supply an

(1) *Master v. Miller*, 4 T. R. 320 ; 2 H. Bl. 140.

(2) *Cowie v. Halsall*, 4 B. & Al. 197.

(3) *Stevens v. Lloyd*, M. & M. 292.

(4) *Farquhar v. Southey* M. & M. 17.

(5) *Hirschfield v. Smith*, 35 L. J., C. P. 177.

(6) *Warrington v. Early*, 23 L. J., Q. B. 47.

omission, and in furtherance of the original intention of the parties. (1)

Thus, where the drawer of a bill, payable to his own order, sent it to the drawee for acceptance, and the drawee requested that a longer time might be allowed for payment, and an alteration to that effect was accordingly made with the consent of the drawer, and the bill was afterwards accepted; it was held that the alteration being made before the bill was an available instrument against any party, the instrument was valid. (2) Upon the same principle, where three persons joined, as drawer, acceptor, and indorser, in the fabrication of an accommodation bill, and the date was altered before it came into the hands of a holder for value; it was held that, as the accommodation parties could not sue upon it *inter se*, it was not, till it came into the hands of a holder for value, an available instrument, and therefore that an alteration before that time did not vitiate it. (3)

But if either payee or indorsee have given value for it; so that the drawer is liable, an alteration, though before acceptance, vacates the bill.

If, again, the alteration were merely to correct a mistake, or to make a bill what it was originally intended to be, it will not avoid it. Thus, where the drawee intended to make the bill negotiable, and indorsed it over, but had omitted the words "OR ORDER," their subsequent insertion in pursuance of the original intention was held not to vacate the bill. (4) So, where a bill having been dated, by mistake, 1822 instead of 1823, the agent of the drawer and acceptor, to whom it had been given to be delivered to the indorsee, without their knowledge or consent corrected the mistake; it was held, that such alteration did not vacate the bill. (5) So, again, a man, who has agreed beforehand to be

(1) *Dodge v. Pringle*, 29 L. J., Exch. 115.

(2) *Kennerley v. Nash*, 1 Stark, 452.

(3) *Downes v. Richardson*, 5 B. & Ad. 674.

(4) *Kershaw v. Cox*, 10 East. 437.

(5) *Ibid.*

a surety, may, after the advance to another maker, sign the note. (1)

A bona fide holder of a bill of exchange accepted payable to ———, or order, may insert his own name as payee, and indorse it, and the bill may be declared on as payable to the party who has inserted his name. (2)

Whether the intent of the alteration were to vary the original contract, or merely to correct a mistake, is a question of fact to the jury.

If a bill be altered so that a man otherwise liable on it is discharged, he is not liable on a bill given in renewal of the altered bill, unless he were actually apprised of the alteration at the time he gave the substituted bill. (3)

Where an alteration appears on the face of a bill or note, it lies on the plaintiff to show that it was made under such circumstances as not to vitiate the instrument. And this rule is most reasonable; for, if it lay on the defendant, on an acceptor for example, sued by an indorsee, to show that the alteration was improperly made, it might be a great hardship; for he may have no means of proving that the bill went unaltered from his hands, or of showing the circumstances of a subsequent alteration. But the burthen of explaining an alteration imposes no hardship on the plaintiff, for if the bill was altered while in his hands, he may, and ought, to account for it; if before, then he took it with a mark of suspicion on its face, which ought to have induced him either to refuse it, or to require evidence of the circumstances under which the alteration was made. (4)

SECT. 2.—OF THE FORGERY OF A BILL OR NOTE.

Forgery is defined to be the making, altering, or misapplying any writing with intent to defraud.

(1) *Dodge v. Pringle*, 29 L. J., Exch. 115.

(2) C. C. L. C. Art. 2282.

(3) *Bell v. Gardiner*, 11 L. J., C. P. 195.

(4) *Byles on Bills*, p. 329.

Forging bills or notes or any part of them, as well as uttering them, knowing them to be forged, are each felonies, punishable by imprisonment in the Penitentiary for life, or for any term not less than five years—or by imprisonment in any other gaol or place of confinement for any term not exceeding two years with or without hard labour, and with or without solitary confinement.

If several persons make different parts of the instrument, they are each chargeable with forging the entire instrument, though they may be ignorant of each other's proceedings. (1)

The offence of forgery is complete without any publication or uttering. (2)

Altering the date of a bill of exchange after acceptance (3): altering the place where a note is made payable (4): or altering the sum for which a bill or note is made payable (5), are forgeries. (6)

If a person is authorized to fill up a bill or note with one sum, it is forgery to fill it up with a larger sum, or even a less sum, and apply the instrument to purposes different from his instructions. (7)

To write one's own name with the intention that it should pass as the signature of another person of the same name is forgery. (8)

(1) *Rex v. Bingley*, R. & R., C. C., 446. *Rex v. Kirkwood*, 1 Mood., C. C., 304. *Rex v. Dade*, 1 Mood., C. C., 307.

(2) *Elletts case*, 1 Leach, C. C., 175. *Crocker's case*, R. & R., C. C., 97.

(3) *Master v. Miller*, 4 T. R., 320. *Rex v. Atkinson*, 7 C. & P., 669.

(4) *Rex v. Treble*, 2 Taunt., 328.

(5) *Rex v. Post*, R. & R., C. & C., 101.

(6) And payment of such will be the loss of the payer for any excess. So one branch of a Bank paying a draft on another branch cannot recover from the party to whom it pays, if an innocent party, though the amount of the draft have been increased. *Union Bank of Lower Canada v. Ontario Bank*, 2 L. N. 132 (1879).

(7) *Rex v. Hart*, Mood., C. C., 486. *The Queen v. Bateman*, 1 Cox, C. C., 186. *The Queen v. Wilson*, 1 Den., C. C., 284.

(8) *Mead v. Young*, 4 T. R., 28. *Rex v. Parkes*, 2 Leach, C. C., 775.

A person having obtained two genuine signatures wrote above one a promissory note; and on the other side of the other a promissory note payable to that person, and so changed the signature into an indorsement, was convicted of forging the note and the indorsement. (1)

Using the genuine signature of one person in any way, so as to make it appear that it is the signature of another person of the same name, is forgery. (2)

Discounting bills or drawing drafts with fictitious names on them is forgery. (3)

Signing a bill or note by procuration for another person fraudulently, and without lawful authority, and uttering such a bill, knowing that it is so signed by procuration without lawful authority, is felony, punishable with imprisonment in the Penitentiary for not more than fourteen and not less than two years; or imprisonment in any other gaol or place of confinement for not more than two years, and with or without hard labour and solitary confinement.

CIVIL CONSEQUENCES OF FORGERY.

Where the title to a bill or note is necessarily made through a forgery, even a *bona fide* holder for value has in general no right to sue upon it, or even return it; and therefore, as a general rule, if the acceptor or maker pay one who derives his title through a forgery, that will not discharge him. (4) So, if a bill or cheque be altered and made payable for a larger sum than that originally inserted, should the drawee,

(1) *Rex v. Hales*, 17 State Tr., 161, 209, 229.

(2) *Reg. v. Blenkinsop*, 1 Den., C. C., 276. *Reg. v. Mitchell*, 1 Den. C. C., 282. *Reg. v. Rogers*, 8 C. & P., 649. *Reg. v. Parke*, 1 Cox, C. C., 4.

(3) *Dunn's case*, 1 Leach, 57. *Bolland's case*, 1 Leach, 83. *Lockett's case*, 1 Leach, 94. *Taft's case*, 1 Leach, 172. *Shephard's case*, 1 Leach, 226. *Reg. v. Wardell*, 3 F. & F., 82.

(4) See *Wenham v. La Banque du Peuple*, 1 L. C. L. J., 30. In this case the signature was so perfect that the Court could scarcely discover any difference between it and the genuine one.

banker or acceptor pay it, he cannot charge the drawer for the difference.

But in case any act of the drawer facilitated or gave occasion to the forgery, he must bear the loss himself. A customer of a Banker, on leaving home, entrusted to his wife several blank forms of cheques, signed by himself, and desired her to fill them up according to the exigency of his business. She filled up one with the words *fifty pounds, two shillings*, beginning the word *fifty* with a small letter in the middle of a line. The figures 52.2 were also placed at a considerable distance to the right of the printed £. She gave the cheque, thus filled up, to her husband's clerk, to get the money. He, before presenting it, inserted the words "*three hundred*" before the word *fifty*, and the figure 3 between the printed £ and the figures 52.2. It was presented and the bankers paid it. Held, that the improper mode of filling up the cheque had invited the forgery, and, therefore, that the loss fell on the customer and not on the banker.

So, if the acceptor of a bill tear the bill in two *animo cancellandi*, and the pieces are picked up in his presence and afterwards joined together, so as to convey no notice of the cancellation to a stranger a *bona fide* indorsee for value may acquire a title.

It is a general rule of law, that money paid under a mistake, *as to facts*, may be recovered back. On this principle, if a forged note be discounted, the transferee, on discovery of the forgery, may recover back the money paid, the imagined consideration totally failing. But any fault or negligence on the part of him who pays the money on the note will disable him from recovering. Thus, where two bills of exchange falling due at different times were drawn on a man, and he paid the first without acceptance, and accepted and paid the second, and the signature of the drawer was some time afterwards discovered to be a forgery, Lord Mansfield held, that an acceptor is bound to know the handwriting of the drawer, and that it is rather by his fault or

negligence than by mistake if he pay on a forged signature. So, where a forged acceptance of the drawee was made payable at the plaintiffs, the drawee's bankers, and they paid the amount to the defendant, as a *bona fide* holder, but seven days afterwards, upon discovering the acceptance to be a forgery, informed the defendant of it, and demanded the money; it was held that they could not recover, for that a banker ought to have known his customer's handwriting. Part of the court held the defendant discharged, on the ground that by the plaintiff's delay in giving notice of the forgery, he had lost his remedy against the antecedent parties. Where the fault is not entirely on the side of the party paying, he may still recover.

So also a bank paying a check to order, on a forged indorsement, must stand the loss. (1) Even if the check so paid is debited in the drawer's pass-book, and the book balanced monthly without complaint of drawer, and the voucher handed over. When the forgery was discovered later, the customer cannot be declared to be deprived of his claim simply on account of these monthly statements. (2)

In like manner, where a clerk had authority to draw checks, signing his employer's name thereto, for a stated period, and the Bank had notice of the limitation of time, but the clerk continued to draw checks in the same manner after the lapse of that time, it was held that the Bank could not charge the depositor with the amount of any checks paid by it which had been drawn by the clerk after his authority had expired. (3)

(1) *Agricultural Invest. Co. v. Federal Bank*, 45. Q. B. Rep. (Ont.) 214.

(2) *Ibid.*

(3) *Manufacturers Nat. Bank v. Barnes*, 65 Ill. 69.

INTRODUCTORY REMARKS TO THE CURRENCY AND DOMINION NOTE ACTS.

Within the past sixty years the subject of regulating the relative value of gold and silver has occupied considerable attention, and been a source of much inconvenience in most commercial communities.

The relative value of these metals being governed, like that of other commodities, by supply and demand, frequent and sometimes important variations in their relative value have occurred. These variations have been produced by two causes, viz., the relative supply obtained from the gold and silver mines, and the action of different countries in making the one or the other the money standard.

In England gold and Bank of England notes are the only legal tender, silver being such only to the amount of two pounds sterling. Until a few years ago both gold and silver were a legal tender in Germany, but silver is now only a subsidiary coin there as in England. On the other hand, the United States have lately adopted the double standard of gold and silver, instead of gold alone as formerly. This, however, only refers to the new silver dollar of a certain weight. In France both gold and silver are legal tender.

The legal tender of the Dominion of Canada consists of gold and Dominion notes, silver being a legal tender only to the extent of ten dollars. No change has been made in the standard of value since 1841, but several changes have been made in the subsidiary or silver legal tender currency. By the Act 16 Vic. British silver was made a legal tender to the extent of two pounds or \$9.73, and as there was no issue of Canadian silver till 1858 the British coin was the only legal tender until that date. In 1870 United States silver coin

was by proclamation made a legal tender to the extent of ten dollars, the half dollar at forty cents and other coins in proportion. The object of this proclamation was to drive the United States silver currency out of circulation, which it did most effectually, its place being supplied by Canadian silver and by Dominion and Bank notes. In 1871 one uniform currency was established for the whole Dominion, thereby embracing Nova Scotia. whose standard of value was previously $2\frac{3}{4}$ per cent. lower, the British sovereign being there equal to five dollars. At the same time that part of the previous Act which had made British silver a legal tender was repealed.

Canada has no mint of its own, no gold coinage, and its silver currency is coined at the Royal Mint.

Before 1858 accounts in Canada were, with few exceptions, kept in pounds, shillings and pence ; but an Act having been passed in 1857, providing that after the first of January, 1858, all Government accounts should be kept in dollars and cents, the principal wholesale houses adopted the same system of keeping their accounts ; but it was not till 1870, when, by order of the Government, the copper pence and half-pence issued by the Banks (and current at sixty pence or one hundred and twenty half pence to the dollar) were received at the Post Office and other public offices at the rate of two cents and one cent respectively, that the decimal currency was fully established in retail transactions.

The various coins which have formed the money of account in Canada at different periods will form the subject of an interesting chapter for the future historian, but cannot, with propriety, be discussed at length in this place. It may be, well, however, to explain that the currencies both of Canada and the United States (as former British colonies), were based upon the old Halifax currency, which bore the relative proportion to sterling money of ten to nine : that is, ten pounds currency were equal to nine pounds sterling. The pound sterling was thus worth one pound two shillings and

two pence currency, or four dollars and forty-four cents of United States money coined before 1834. At that date the weight of the United States coinage was reduced to the extent that it required nine and one-half per cent. to be added to the old par of \$4.44 to express the value of a sovereign in the new coinage, and thus nine and one-half per cent. premium became the new par of exchange in the United States. For some years, however, that country has abandoned this method of calculating sterling, and simply buys and sells at so much per pound, thus: sight \$4.85—sixty days \$4.81.

The Provinces of Upper and Lower Canada, which in 1796 had made the United States coinage a legal tender at five shillings currency to the dollar, and thus at that early date adopted the same unit of account or standard of value, followed the action of the United States, and reduced the intrinsic value of the legal tender to the same extent by the Act of 1841, so that nine one and-half per cent. premium on the old par of £1 2s. 2d., or £1 4s. 4d. became the new par of exchange. Since the adoption of the decimal system in 1858, sterling exchange is calculated at so much per cent. premium on \$4.44, the new par of nine and one-half per cent. premium, or \$4.86 $\frac{2}{3}$, being the legal value of the British sovereign when used as a tender. Canada has thus a double gold legal tender, the British coins as stated above, and the United States coinage at par. As a result of this regulation the Government and the Banks have the option of redeeming their issues in either British or American coin. The Bank issues, however, being redeemable in Government legal tender notes but little gold is paid out except at the Sub-Treasuries, where, when sterling exchange is low, British gold is disbursed, and when high the notes are redeemed in double eagles of the United States, the smaller gold coins, as a rule, being too much worn to serve the purpose of a legal tender.

The Dominion or Legal Tender note issue has not been brought to its present perfection without much study and

several changes. Thirty-nine years ago when a cautious Bank and an empty Government Exchequer put the Finance Minister of the day to his wits end, that talented gentleman (the late Sir Francis Hincks), to meet the pressing demands upon the Government, obtained the authority of Parliament to issue, with the view of circulating as currency, £600,000 or \$2,400,000, in Debentures of £2. 10. 0., or \$10 each, payable one year after date with interest of six per cent. These notes were not a legal tender, but were receivable for custom's duties and other debts due to the Government. They were not when issued received on deposit by the Banks, but passed pretty freely from hand to hand, sometimes at par and sometimes at a small discount, until near their maturity, when they rose to a premium. The issue was partly renewed in 1850, but the finances of the Government having greatly improved no further issues were made.

It was not, however, till 1866 that any attempt was made to establish a legal tender Government issue. In that year an Act was passed by which the Government of the then Province of Canada was empowered to issue Provincial Notes, to an amount not exceeding five million dollars for the general purposes of the Province, and a further amount of three millions of dollars for purposes relative to the surrender by all or any of the chartered Banks of their power to issue notes. Such notes were to be a legal tender, and were to be payable at offices to be established at Montreal and Toronto.

The issue was made in accordance with the above Act, and was managed entirely by the Bank of Montreal, which for a time relinquished its own circulation and used that of the Government, but no other bank followed its example. In 1868 this Act was amended by being applied to the whole Dominion, legalizing the Provincial notes as notes of the Dominion, providing for the establishment of branches of the Receiver General's Department in Montreal, Toronto, Halifax and St. John, and fixing the amount of specie and other securities to be held against the issues authorized by the Act.

In 1870 the power to issue notes under four dollars was withdrawn from the Banks and assumed by the Government, which at once established branch offices in the above-named cities for the distribution and redemption of its notes. By the amended Banking Act of 1880, the Banks were forbidden to issue notes under five dollars, and above that sum can only issue multiples of five.

It may be well to mention that the notes of the Government are of the denominations of one, two, four, twenty, fifty, one hundred, five hundred, and one thousand dollars: the one two and four dollar notes being in actual circulation, while the larger denominations are held by the Banks instead of specie, in accordance with the provisions of the Banking Act. On the Bank of Montreal relinquishing the management of the Dominion notes it resumed its own circulation.

APPENDIX.

CHAPTER 30, A. D. 1886.

An Act respecting the Currency.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :

1. The denominations of money in the currency of Canada shall be dollars, cents and mills,—the cent being one hundredth part of a dollar, and the mill one tenth part of a cent. Denominations in currency.
34 V., c. 4, s. 2.

2. The currency of Canada shall be such, that the British sovereign, of the weight and fineness now prescribed by the laws of the United Kingdom, shall be equal to and shall pass current for four dollars eighty-six cents and two-thirds of a cent of the currency of Canada, and the half sovereign of proportionate weight and like fineness, for one half the said sum : and all public accounts throughout Canada shall be kept in such currency ; and in any statement as to money or money value, in any indictment or legal proceeding, the same shall be stated in such currency ; and in all private accounts and agreements rendered or entered into on or subsequent to the first day of July, one thousand eight hundred and seventy-one, all sums mentioned shall be understood to be in such currency, unless some other is clearly expressed, or must, from the circumstances of the case, have been intended by the parties. Standard of value of Canada currency.
34 V., c. 4, s. 3.

3. No Dominion note or Bank note, payable in any other currency than the currency of Canada, shall be issued or re-issued by the Government of Canada, or by any Bank, and all such notes issued before the first day of July, one thousand eight hundred and seventy-one, shall be redeemed, or notes payable in the currency of Canada shall be substituted or exchanged for them. No bank notes, &c., to be in any other currency.
34 V., c. 4, s. 5.

4. Any gold coins which Her Majesty causes to be struck for circulation in Canada, of the standard of fineness pres- Gold coins may be struck for Canada.

scribed by law for the gold coins of the United Kingdom, and bearing the same proportion in weight to that of the British sovereign, which five dollars bear to four dollars, eighty-six cents and two-thirds of a cent, shall pass current and be a legal tender in Canada for five dollars; and any multiples or divisions of such coin, which Her Majesty causes to be struck for like purposes, shall pass current and be a legal tender in Canada at rates proportionate to their intrinsic value respectively; and any such coins shall pass by such names as Her Majesty assigns to them in her proclamation declaring them a legal tender, and shall be subject to the like allowance for remedy as British coin. 34 V., c. 4, s. 6.

Certain silver and copper coins struck by order of Her Majesty to be a legal tender throughout Canada.

5. The silver, copper or bronze coins which Her Majesty has heretofore caused to be struck for circulation in the Provinces of Quebec, Ontario, and New Brunswick, under the Acts then in force in the said Provinces respectively, shall be current, and a legal tender throughout Canada, at the rates in the said currency of Canada assigned to them respectively, by the said Acts, and under the like conditions and provisions: and such other silver, copper or bronze coins as Her Majesty causes to be struck for circulation in Canada, shall pass current and be a legal tender in Canada, at the rates assigned to them respectively by Her Majesty's Royal Proclamation,—such silver coins being of the fineness now fixed by the laws of the United Kingdom, and of weights bearing respectively the same proportion to the value to be assigned to them, which the weights of the silver coins of the United Kingdom bear to their nominal value; and all such silver coins aforesaid shall be a legal tender to the amount of ten dollars, and such copper or bronze coins to the amount of twenty-five cents, in any one payment; and the holder of the notes of any person, to the amount of more than ten dollars, shall not be bound to receive more than that amount in such silver coins in payment of such notes if presented for payment at one time, although any of such notes is for a less sum. 34 V., c. 4, s. 7.

Amount which may be tendered in one payment.

No other coins of silver or copper to be so.

6. No other silver, copper or bronze coins than those which Her Majesty causes to be struck for circulation in Canada, or in some Province thereof, shall be a legal tender in Canada. 34 V., c. 4, s. 8.

7. Her Majesty may, by Proclamation, from time to time, ^{As to foreign gold coins.} fix the rates at which any foreign gold coins of the description, date, weight and fineness, mentioned in such Proclamation, shall pass current, and be a legal tender in Canada: Provided that until it is otherwise ordered by any such Proclamation, the gold eagle of the United States of America, ^{Provis : as to U.S. Eagle.} coined after the first day of July, one thousand eight hundred and thirty-four, and before the first day of January, one thousand eight hundred and fifty-two, or after the said last mentioned day, but while the standard of fineness for gold coins then fixed by the laws of the said United States remains unchanged, and weighing ten pennyweights, eighteen grains, troy weight, shall pass current and be a legal tender in Canada for ten dollars; and the gold coins of the said United States being multiples and halves of the said eagle, and of like date and proportionate weights, shall pass current and be a legal tender in Canada for proportionate sums. 34 V., c. 4, s. 9.

8. The stamp of the year on any foreign coin made current ^{Proof of date, &c., of coins.} by this Act, or any Proclamation issued under it, shall establish *prima facie* the fact of its having been coined in that year; and the stamp of the country on any foreign coin shall establish *prima facie* the fact of its being of the coinage of such country. 34 V., c. 4, s. 10.

9. No tender of payment in money in any gold, silver or ^{Defaced coin not a legal tender.} copper coin which has been defaced by stamping thereon any name or word, whether such coin is or is not thereby diminished or lightened, shall be a legal tender. 32-33 V., c. 18, s. 17, *part*.

10. All sums of money payable on and after the first day of ^{Payments in Nova Scotia on and after 1st July, 1871, to be in Canada currency.} July, one thousand eight hundred and seventy-one, to Her Majesty, or to any person, under any Act or law in force in Nova Scotia, passed before the said day, or under any bill, note, contract, agreement or other document or instrument, made before the said day in and with reference to that Province, or made after the said day out of Nova Scotia and with reference thereto, and which were intended to be, and but for such alteration would have been payable in the currency of Nova Scotia, as fixed by law previous to the fourteenth day of April, one thousand eight hundred and seventy-one, shall hereafter be represented and payable, respectively, by equiva-

^{How to be calculated.}

lent sums in the currency of Canada, that is to say, for every seventy-five cents of Nova Scotia currency, by seventy-three cents of Canada currency, and so in proportion for any greater or less sum: and if in any such sum there is a fraction of a cent in the equivalent in Canada currency the nearest whole cent shall be taken. 34 V., c. 4, s. 4.

As to debts in
B.C. & P.E.I.
contracted be-
fore 1st July,
1881.

11. Any debt or obligation contracted before the first day of July, in the year one thousand eight hundred and eighty-one, in the currency then lawfully used in the Province of British Columbia, or in the Province of Prince Edward Island, shall, if payable thereafter, be payable by an equivalent sum in the currency hereby established. 44 V., c. 4, s. 1.

Sums mentioned
in certain Acts
to be currency of
Canada.

12. All sums mentioned in dollars and cents in "*The British North America Act, 1867*," and in all Acts of the Parliament of Canada, shall, unless it is otherwise expressed, be understood to be sums in the currency by this Act established. 31 V., c. 45, s. 2.

CHAPTER 31, A. D. 1886.

An Act respecting Dominion Notes.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. The expression "specie" in this Act means coin current Interpretation. by law in Canada, at the rates and subject to the provisions of the law in that behalf, or bullion of equal value according to its weight and fineness. 31 V., c. 46, s. 13, *part*.

2. The Governor in Council may authorize the issue of Issue of Dominion notes. Dominion Notes to an amount not exceeding that herein specified, and such Dominion notes may be of such denominational values and in such form, and signed by such persons and in such manner, by lithograph, printing or otherwise as he, from time to time, directs: and such notes shall be redeemable in specie on presentation at branch offices established or at banks with which arrangements are made as hereinafter provided at Montreal, Toronto, Halifax, St. John, N.B., Winnipeg, Charlottetown and Victoria, and at that one of the said places at which they are respectively made payable. 31 V., c. 46, s. 8, *part*:—43 V., c. 13, s. 4, *part*.

3. The amount of Dominion notes issued and outstanding Amount of Dominion notes. at any time may, by Order in Council, founded on a report of the Treasury Board, be increased to, but shall not exceed twenty million dollars, by amounts not exceeding one million dollars at one time, and not exceeding four million dollars in any one year: Provided that the Minister of Finance and Receiver General shall always hold, for securing the redemption of such notes issued and outstanding an amount in Proviso: amount in gold and guaranteed securities to be held for redemption. gold, or in gold and Canada securities guaranteed by the Government of the United Kingdom, equal to not less than twenty-five per cent. of the amount of such notes—at least fifteen per cent. of the total amount of such notes being so held in gold; and provided, also, that the said minister shall And in unguaranteed debentures. always hold for the redemption of such notes an amount equal

to the remaining seventy-five per cent. of the total amount thereof, in Dominion debentures issued by authority of Parliament. 43 V., c. 13, s. 1, *part*.

Notes to be a legal tender.

4. Such notes shall be a legal tender in every part of Canada, except at the offices at which they are respectively made payable: the proceeds thereof shall form part of the Consolidated Revenue Fund of Canada, and the expenses lawfully incurred under this Act shall be paid out of the said fund. 43 V., c. 13, s. 5, *part*.

Debentures may be delivered to Minister of Finance, and disposed of by him for the purposes of this Act.

Proviso.

5. Debentures of Canada may be issued and delivered to the Minister of Finance and Receiver General for the general purposes of this Act, and to enable him to comply with its requirements,—such debentures being held as aforesaid for securing the redemption of Dominion notes, and the said Minister having full power to dispose of them, and of the guaranteed debentures aforesaid, either temporarily or absolutely, in order to raise funds for such redemption, and for the purpose of procuring the amounts of gold required to be held by him under this Act, but nothing herein contained shall be construed to authorize the issue of debentures not otherwise authorized by Parliament, or any increase of the debt of Canada beyond the amount so authorized. 43 V., c. 13, s. 2.

Amount to be issued against gold only.

6. If any amount of Dominion notes is issued and outstanding at any time in excess of the amount then authorized as aforesaid, the Minister of Finance and Receiver General shall hold gold to the full amount of such excess, for the redemption of such notes; and any amount of such notes which the public convenience requires may be issued and remain outstanding, provided the excess of such amount over that so authorized is represented by an equal amount of gold held by the Minister of Finance and Receiver General as aforesaid; and the issue of Dominion notes so represented in full by gold, shall not be deemed an increase of the public debt; but except in the case of notes so issued against an equal amount of gold, the total amount of Dominion notes outstanding shall never exceed the amount authorized under section three of this Act. 33 V., c. 10, s. 6.

Minister of Finance to pub-

7. The Minister of Finance and Receiver General shall publish monthly in the *Canada Gazette* a statement of the

amount of Dominion notes outstanding on the last day of the preceding month, and of the gold, guaranteed debentures and unguaranteed debentures then held by him for securing the redemption thereof, distinguishing the amounts of each so held at each of the cities at which Dominion notes are redeemable; and such statements shall be made up from returns made to the said Minister by the branch offices, bank or banks at which such notes are redeemable. 43 V., c. 13, s. 3.

lish monthly statements.

8. The Governor in Council may, in his discretion, establish branch offices of the Department of Finance at Montreal, Toronto, Halifax, St. John, N.B., Winnipeg, Charlottetown, and Victoria, respectively, or any of them, for the redemption of Dominion notes, or may make arrangements with any chartered bank or banks for the redemption thereof, and may allow a fixed sum per annum for such service at all or any of the said places; and gold or debentures held at any such branch office or by any such bank for the redemption of Dominion notes, shall be deemed to be held by the Minister of Finance and Receiver General: Provided that any Assistant Receiver General appointed at any of the said cities under the "*Act respecting Government Savings Banks*," shall be an agent for the issue and redemption of such notes. 33 V., c. 10, s. 7;—39 V., c. 4;—43 V., c. 13, s. 4, *part*.

Offices or agencies for redemption of notes.

9. Provincial notes issued under the Act of the late Province of Canada, passed in the session held in the twenty-ninth and thirtieth years of Her Majesty's reign, chapter ten, shall be held to be notes of the Dominion of Canada, and shall be redeemable in specie on presentation at Montreal, Toronto, Halifax or St. John, N. B., and at that one of the said places at which they are respectively made payable, and shall be (as provided by the lastly mentioned Act) a legal tender except at the offices at which they are respectively made payable. 31 V., c. 46, s. 8, *part*.

Redemption of Provincial notes.

CHARTER 121, A.D. 1886.

An Act respecting Government Savings Banks.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

INTERPRETATION.

- Interpretation. 1. In this Act, unless the context otherwise requires,—
“ Minister.” (a). The expression “ the Minister ” means the Minister of Finance and Receiver General :
“ Agent.” (b). The expression “ agent ” includes Assistant Receiver General.
34 V., c. 6, s. 1, *part*.

ESTABLISHMENT OF SAVINGS BANKS.

- Assistant Receiver General may be appointed at certain places. 2. The Governor in Council may, from time to time, appoint at each of the cities of Toronto, Montreal, Halifax, St. John, N. B., and at any place within the Provinces of British Columbia, Prince Edward Island and Manitoba, and at any place within any Province which shall hereafter form part of Canada, a person who shall be called an Assistant Receiver General; and the Governor in Council may also establish a savings bank at each of the said cities and at any place in each of the said Provinces, and in any Province which shall hereafter form part of Canada,—of which savings banks respectively, the Assistant Receiver General appointed for the city or place where the savings banks are respectively established, shall have the management :
Savings Banks may be established at such places. (2) The Governor in Council may also establish, in any other places in the Provinces of Nova Scotia and New Brunswick, branch savings banks, and may appoint persons as agents for the management thereof. 34 V., c. 6, s. 1, *part and s. 18, part*.
And at other places.

DEPOSITS AND DUTIES OF OFFICERS.

- Deposits may be received. 3. Every agent shall, under regulations from time to time made in that behalf by the Treasury Board, with the approval

of the Governor in Council, receive deposits of money on account of the Minister, and shall repay the same with interest to the depositor as hereinafter provided :

2. Such of the collectors of customs, in the Province of New Brunswick, as are authorized to receive deposits of moneys as savings, shall continue to receive the same until other savings bank agents are appointed in their stead respectively, and shall be subject to all the provisions of this Act as such agents, and any moneys received by such collectors before the coming into force of this Act shall be dealt with by them as moneys received by them under this Act. 34 V., c. 6, s. 1, *part.*

Deposits with collectors of Customs in N.B.

4. The Governor in Council may also appoint an inspector or inspectors, to inspect, investigate and report upon the business which arises in carrying out the provisions of this Act, to which inspectors the agents appointed to receive deposits, and all other persons who are employed under this Act, shall afford all needful facilities for such inspection and investigation; and the duties and powers of such inspectors shall be such as are assigned to them under the regulations made under this Act. 34 V., c. 6, s. 14.

Inspectors may be appointed.

Their duties.

5. Every agent, officer, clerk and servant employed under this Act, who is intrusted with and has the custody of any moneys or valuable securities, shall, before entering upon the duties of his office or employment, give such security for the faithful discharge of the same, and for the due accounting for all such moneys, as is required of him by the Treasury Board; and shall also take an oath or affirmation before a justice of the peace, faithfully to perform his said duties; which oath or affirmation any justice of the peace is hereby authorized to administer ;

Security to be given.

And oath taken.

(2.) Such oath or affirmation shall be in the form following in words to the same effect, that is to say :

Form of oath.

I, A. B., of _____ being duly sworn, swear, (or do solemnly affirm) that so long as I am employed in assisting to carry out the provisions of the Act intituled "*An Act respecting Government Savings Banks,*" I will perform

faithfully and to the best of my ability the duties that are assigned to me.

And I have signed,

Sworn (or affirmed) at this
day of , 18 , before me, A. B.,

Justice of the Peace for the of

34 V., c. 6, s. 11.

From whom deposits may be received and to whom payments may be made.

6. Every agent appointed to receive deposits may receive deposits from any person, whatever is his status or condition in life, and whether such person is qualified by law to enter into ordinary contracts or not; and, from time to time, may pay any or all of the principal thereof, and the whole or any part of the interest thereon to such person, without the authority, aid, assistance or intervention of any person or official being required, notwithstanding any law, usage or custom to the contrary: Provided always, that if the person who makes any such deposit could not, under the laws of the province where the deposit is made, deposit and withdraw money in and from a bank, in such case the total amount of deposits to be received from such person shall not exceed the sum of five hundred dollars. 34 V., c. 6, s. 7.

Proviso: limit in a certain case.

Depositor to give his address, &c.

7. Every depositor, on making his first deposit, shall declare his name, residence and occupation; but the persons employed in the receipt or payment of such deposits shall not disclose the name of any depositor, or the amount deposited or withdrawn, except to the minister or to such of his officers as are appointed to assist in carrying into operation the provisions of this Act. 34 V., c. 6, s. 3.

Deposits how made, entered and proved.

8. Every such deposit received by such agent shall be entered by him, at the time, in a book to be kept by him for that purpose, and at the same time shall be entered by him in a pass book to be furnished to the depositor; and the entry in such pass book, attested by the signature or initials of the agent who receives the deposit, or of his deputy or clerk, shall be evidence of the claim of such depositor to the repayment thereof, with interest thereon upon demand made during office hours by such depositor on such agent or his successor

in office, at the office or place where such deposits are payable, subject to the provisions following, that is to say :—

(a) Every agent shall report to the Minister, at such times ^{Report to minister.} and in such forms as are prescribed by the regulations under this Act, all deposits received by him.

(b) At such times as are prescribed by the regulations made under this Act, but not at less intervals than the beginning of ^{Periodical report, and its effect as to deposit accounts.} each calendar month, the officer appointed thereto by the Minister shall send, by mail, to each depositor, to the address given by him, a notice stating the amount deposited by him since the statement of the same kind then last sent to him, if any, and the total amount then at his credit; and the amount mentioned in such notice, and no more, shall be the amount for which the Crown shall be liable up to the last deposit therein mentioned, unless the depositor, within thirty days after the receipt of such notice, notifies the Minister, in such manner as is prescribed by the regulations then in force, that there is some error and what error, in such notice,—in which case the amount shall be ascertained, and the depositor shall be notified accordingly. 34 V., c. 6, s. 2.

9. Every agent shall, at such times as are prescribed by the regulations then in force, pay in to the account of the Minister ^{Disposal of deposits and payment of withdrawals.} at such bank as is prescribed by the Minister, all moneys received on deposit, and he shall pay all moneys which are withdrawn in such manner as by the said regulations is prescribed.

2. Every agent shall also, at such times as are prescribed ^{Detailed account to be furnished to the minister.} transmit to the Minister, in such form as is prescribed by the Minister, a detailed account of the business of his office during the time that has elapsed since the transmission of his next preceding account. 34 V., c. 6, s. 4.

10. The interest payable to the persons making such ^{Interest on deposits.} deposits shall be at such rate, not less than four per centum per annum, as the Governor in Council, from time to time, prescribes; but such interest shall not be calculated on any sum less than one dollar, or on any sum other than a dollar or the multiple of a dollar. 34 V., c. 6, s. 5.

11. On the thirtieth day of June in every year the interest ^{Interest added yearly to capital.} accrued on deposits shall be added to and become part of the principal money. 34 V., c. 6, s. 6.

Officers of Government not bound to see to trusts.

12. No officer of the Government of Canada shall be bound to see to the execution of any trust, whether expressed, implied or constructive, to which any deposit made under the authority of this Act is subject; and the receipt of the person in whose name any such deposit stands, or, if it stands in the name of more than one person, the receipt of any one of such persons shall be a sufficient discharge to all persons concerned for the payment of any money payable in respect of such deposit, notwithstanding any trust to which such deposit is then subject, and whether or not the agent sought to be charged with such trust, and with whom the deposit was made, or his successor, had notice thereof; and no agent or any other officer of the Government shall be bound to see to the application of the money paid upon such receipt. 34 V., c. 6, s. 8.

Certain payments valid.

13. Every payment made in good faith to any person who appears *prima facie*, by the production of a declaration in writing and documents in support thereof, made under the provisions of this Act, to be entitled to any deposit or interest, shall be valid and shall discharge the Crown and the agent with whom the deposit has been made, and his successors, and all who might otherwise be liable, from all or any further claim by any person whomever for such deposit or interest. 34 V., c. 6, s. 9.

Deposits to form part of Con. Rev. Fund, &c.

14. All moneys deposited under this Act shall form part of the Consolidated Revenue Fund of Canada, and all moneys and interest paid to depositors, and all expenses incurred in maintaining the savings banks established under this Act, shall be paid out of the Consolidated Revenue Fund of Canada. 34 V., c. 6, s. 22, *part*.

REGULATIONS.

Governor in Council may make regulations for certain purposes.

15. The Governor in Council may make regulations for prescribing the mode of keeping, examining, inspecting, checking and reporting on the accounts of depositors, and of withdrawing deposits and interest, and the issuing of deposit certificates, and also respecting the payment or transmission thereof in case of infancy, death, bankruptcy, marriage or other change in the circumstances of any depositor, and for prescribing how and in what manner any such payment or transmis-

sion shall be made, and what declaration, documents or other evidence shall be necessary and sufficient in proof of the same, and also respecting the duties and powers of inspectors appointed under this Act, and all other matters which the Governor in Council deems incidental to the carrying of this Act into effect:

2. All regulations so made shall be binding on the persons ^{To be binding.} interested in the subject matter thereof, to the same extent and as fully, to all intents and purposes, as if such regulations formed part of this Act: and such regulations, and all ^{Publication.} amendments thereof, shall be published in such way as the Governor in Council directs, and any copy of such regulations published as aforesaid shall be evidence thereof:

3. Copies of such regulations shall be laid before both Houses ^{Copies to be laid before Parlia- ment.} of Parliament, by the Minister, within fourteen days after the commencement of the session held next following the making of such regulations. 34 V., c. 6, s. 10.

RETURNS.

16. As soon as possible after the end of each month, the ^{Monthly state- ments by the Minister.} Minister shall prepare and insert in the *Canada Gazette* a statement of all moneys received or deposited and withdrawn during the preceding month, and of the total amount on deposit at the end of the preceding month, and the rate of interest payable on the same. 34 V., c. 6, s. 23.

17. An account of the expenses incurred, of the amount ^{Accounts to be laid before Parlia- ment.} of deposits received and paid, and of the total amount due at the close of the financial year, to all depositors, under this Act shall be laid before both Houses of Parliament by the Minister, within ten days after the commencement of the next following session thereof. 34 V., c. 6, s. 22, *part*.

INCREASE OF PUBLIC DEBT.

18. If, at the end of any month, by reason of the amount ^{Provision if pub- lic debt is in- creased by de- posits beyond amount author- ized.} of deposits in the savings banks established under this Act, and in the Post Office Savings Bank, and the issue and sale of the five per cent. Dominion Stock and any other public secu- rity, the issue and sale of which is authorized by "*The Consoli- dated Revenue and Audit Act*," or by any of the said causes,

the amount of the public debt authorized by Parliament is exceeded, the Minister shall report such excess to the Treasury Board, who shall thereupon direct him to purchase, to the extent of such excess, debentures of the Dominion of Canada already issued, or debentures of the late Province of Canada, or of either of the Provinces of Nova Scotia or New Brunswick, issued before the first day of July, one thousand eight hundred and sixty-seven, and such debentures shall then be cancelled, or may be held in reserve until there is authority to reissue them. 34 V., c 6, s. 21.

OFFENCES AND PENALTIES.

Punishment of agents, &c., committing certain offences.

19. Every agent appointed to receive deposits, as aforesaid, and every officer, clerk or servant employed under the provisions of this Act, who defaces, alters, erases, or, in any manner or way whatsoever, changes the effect of the books of account that are kept under the provisions of this Act, or any entry in the said books of account, for any fraudulent purpose,—and every such agent, officer, clerk or servant who secretes, appropriates or embezzles any bond, obligation, bill or note, or any security for money or any moneys or effects intrusted to him or in his custody, or to which he has obtained access, as such agent, officer, clerk or servant, to whomsoever the said property belongs, is guilty of felony and liable to imprisonment for life 34 V., c. 6, s. 12, *part*.

Punishment of persons falsely pretending to be owners of deposits.

20. Every person who, with intent to defraud, falsely pretends to be the owner of any deposit made under this Act or of the interest upon such deposit, or of any part of such deposit, or interest, and who is not such owner, and who demands or claims from the agent with whom such deposit has been made, or from any other person employed under this Act the payment of such deposit or interest, or of any portion thereof, as the case may be, and whether he does or does not thereby obtain any such deposit or interest, or any part thereof, is guilty of a misdemeanor and shall be punishable accordingly. 34 V., c. 6, s. 13, *part*.

As to certain deposits in N. S. and N. B.

21. The capital represented by deposits in the savings banks in Nova Scotia and New Brunswick, in deposit accounts as to which there have been no deposits or withdrawals since

the first day of July, one thousand eight hundred and sixty-seven, shall not be charged against those Provinces respectively as part of the debt with which they entered the Union, but all such accounts shall be transferred to a suspense ledger, and if any deposit or withdrawal is made in any such account, it shall be removed from the suspense ledger and the capital presented by such account and the interest accrued since the first day of July, one thousand eight hundred and sixty-seven, shall be charged against Nova Scotia or New Brunswick, as the case may be. 34 V., c. 6. s. 17.

CHAPTER 122, A. D. 1886.

An Act respecting certain Savings Banks in the Provinces of Ontario and Quebec.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

Interpretation.
"The bank."

1. In this Act, unless the context otherwise requires, the expression "the bank" means any savings bank to which this Act applies.

CHARTERS CONTINUED.

Charters continued subject to certain conditions.

2. The charters of the several savings banks to which charters were granted by the Governor General in accordance with the Act passed by the Parliament of Canada in the thirty-fourth year of Her Majesty's reign, chapter seven,—to all of which this Act applies,—are hereby continued and shall remain in force until the first day of July, in the year one thousand eight hundred and ninety-one, except in so far as they or any of them are or become forfeited or void under the terms thereof, or of this Act, or of any other Acts heretofore or hereafter passed relating to the said savings banks, by non-performance of the conditions of such charters respectively or by insolvency or otherwise. 44 V., c. 8, ss. 1 and 5.

INTERNAL REGULATIONS.

Notice of meeting.

3. Public notice shall be given by the directors of the Bank of the holding of annual or other meetings, by publishing the same for at least four weeks in a newspaper at the place where the head office of the Bank is situate; and if such head office is in the Province of Quebec, such notice shall be given both in the English and French languages. 44 V., c. 8, s. 3.

Qualification and election of directors.

4. The qualification of a director shall be the holding of twenty-five shares of stock; and the director shall be elected annually at a general meeting of the shareholders, and shall be eligible for re-election:

2. Each shareholder shall, on every occasion on which the ^{Votes on shares.} votes of the shareholders are taken, have one vote for each share held by him for at least three months before the time of voting :

3. Shareholders may vote by proxy,—but no person but a ^{Proxy.} shareholder shall vote or act as such proxy :

4. No cashier, bank clerk or other officer of the Bank shall ^{Officer not to vote.} vote either in person or by proxy, or hold a proxy for that purpose :

5. Every director of the Bank who becomes openly and notoriously insolvent, or assigns his estate and effects for the benefit of his creditors, or absents himself, without the consent of the board, for twelve consecutive months from the meetings of the directors, or is convicted of any felony, shall thereupon, *ipso facto*, cease to be a director, and the vacancy so created shall forthwith be filled up in the manner provided by the charter. 34 V., c. 7, ss. 7 and 27. ^{Director becoming insolvent, &c.}

5. No failure to elect directors of the Bank shall operate ^{Failure to elect directors, how remedied.} any dissolution of the corporation; but in case of such failure to elect, the required election shall be made as soon thereafter as possible, at a special meeting of the shareholders,—which the directors are hereby authorized to call for that purpose; and until such subsequent election takes place, the official acts of the directors holding office shall be valid. 34 V., c. 7, s. 26.

CALLS.

6. The directors may call up the stock subscribed for and ^{Calls on stock.} remaining unpaid, by calls not exceeding five per cent, made at intervals of not less than three months, whenever it is, in their opinion, necessary or expedient to make such calls; and all stock when paid up shall be invested in the manner hereinafter provided as to the investment of moneys deposited with the Bank: Provided that the limitation of the amount of ^{Proviso.} any call, or of the intervals at which calls may be made, shall not apply to the case of deficiency of the funds of the Bank to meet the claims of depositors and other liabilities hereinafter provided for. 34 V., c. 7, s. 9;—36 V., c. 72, s. 1, *part*.

Recovery of calls
by action and
proof in such
case.

7. The amount of every such call, if not paid when due, may be recovered with interest by the directors, in the name of the Bank, in any court having jurisdiction to the amount; and in any action for the recovery thereof, it shall be sufficient to allege and prove the charter, and that the calls were made under this Act, and that the defendant is the holder of a share or shares in respect of which the amount is due, without alleging or proving any other matter or thing whatsoever; and the evidence of any officer of the Bank, cognizant of any fact required to be proved, shall be sufficient proof thereof, and any copy of the charter, purporting to be certified as a true copy thereof by the Secretary of State of Canada, shall be deemed authentic and shall be *prima facie* evidence of the charter and of the contents thereof. 34 V., c. 7, s. 10.

LIABILITY OF SHAREHOLDERS.

Liability of
shareholders in
case of deficiency
of assets.

8. The shareholders of the Bank shall, in the event of its funds in money and assets immediately convertible into money becoming insufficient to satisfy its debts and liabilities, be liable for the deficiency, so far as that each shareholder shall be liable to an amount equal to the amount, if any, not paid up, of his shares, and no more; and the directors may and shall make calls on the stock not paid up to the full amount not paid up, or to such less amount as they deem necessary to pay all such claims and other liabilities, without waiting for the collection of any debts due to the Bank, or the sale of any of its assets or property:

Calls in such
case.

Intervals and
notice.

2. Such calls shall be made at intervals of thirty days, and upon notice to be given thirty days at least prior to the day on which the call is payable:

Amount and en-
forcement.

3. No such call shall exceed twenty per cent. on each share, and payment thereof may be enforced in the manner hereinbefore provided as to calls on unpaid-up stock:

First call.

4. The first of such calls shall be made within ten days after such deficiency is ascertained:

Effect of failure
to pay

5. Failure, on the part of any shareholder liable to such call, to pay the same when due, shall operate a forfeiture by such shareholder of all claim in or to any part of the assets of the Bank; but such call and any further call thereafter shall

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nevertheless be recoverable from him as if no such forfeiture had been incurred :

6. Every director who refuses to make or enforce, or to concur in making or enforcing any call under this section, is guilty of a misdemeanor, and shall be personally responsible for any damages suffered by reason of such default : and every liquidator or other officer or person appointed to wind up the affairs of the Bank, in case of its insolvency, shall have the powers of the directors with respect to such calls. 34 V., c. 7, s. 11 and s. 12, *part*.

Liability of director failing to make such call.

9. Persons who, having been shareholders in the bank, have only transferred their shares or any of them to others or registered the transfer thereof, within one month before the commencement of the failure of the bank to meet the claims of its depositors on demand, shall be liable to calls on such shares under the next preceding section, as if they had not transferred them, saving their recourse against those to whom they were transferred. 34 V., c. 7, s. 12, *part*.

Liability after transfer in a certain case.

DIVIDENDS.

10. The directors of the Bank shall make half-yearly dividends of so much of the profits of the Bank as to the majority of them seems advisable, and as is not inconsistent with the provisions of this Act, and they shall give public notice of the payment of such dividends at least thirty days previously, in the manner herein provided, as to notices of meetings. 44 V., c. 8, s. 4.

Dividends and notice thereof.

TRANSFER OF SHARES AND DEPOSITS.

11. The shares in the Bank shall be personal property and shall be transferable in the manner provided by the by-laws and regulations made as prescribed by the charter ; and the transferee shall have the rights and shall be subject to the liabilities of the original holder :

Transfer of shares.

2. No share shall be divided,—and if any share is held by several persons jointly, one of them shall be appointed by letter of attorney by the others to vote thereon, to receive dividends and to do all things that require to be done in respect thereof ; and such letter of attorney shall be lodged with the Bank. 34 V., c 7, s. 13.

Joint holders of shares.

Transmission of shares or deposits otherwise than by transfer.

Declaration in such case.

12. If the interest in any deposit or share in the Bank becomes transmitted in consequence of the death or insolvency of any depositor or shareholder, or in consequence of the marriage of a female depositor or shareholder, or by any other lawful means than by a transfer upon the books of the Bank or by deed served upon the Bank, such transmission shall be authenticated by a declaration in writing,—which declaration shall distinctly state the manner in which and the person to whom such deposit or share has been transmitted, and shall be, by such person, made and signed; and every such declaration shall be, by the person making and signing the same, sworn to before a judge or justice of a court of record or chief magistrate of a city, town, borough or other place, or before a notary public, where the same is made and signed; and every such declaration, so signed and sworn to, shall be left with the manager or other officer or agent of the Bank, who shall thereupon enter the name of the person, so entitled to such deposit or share under such transmission, as proprietor thereof, in the books of the bank; and until such transmission is so authenticated, no person claiming by virtue of any such transmission, shall be entitled to receive such deposit or share, or any part thereof, or any interest or dividend thereon:

How authenticated elsewhere than in a British possession.

2. Every such declaration and instrument as by this and the next following section of this Act are required to perfect the transmission of a deposit or share in the Bank, made in any other country than Canada or some other of the British colonies in North America, or in the United Kingdom of Great Britain and Ireland, shall be further authenticated by the British consul or vice-consul, or other accredited representative of the British Government in the country where the declaration is made, or shall be made directly before such British consul or vice-consul or other accredited representative:

Further evidence may be required.

3. Nothing in this Act contained shall prevent the directors, manager or other officer or agent of the Bank from requiring corroborative evidence of any facts alleged in any such declaration:

Payment to discharge the bank.

4. If payment is made to any depositor of any deposit or of any interest thereon, or of any dividend on any share, after transmission thereof by any of the means mentioned in this section, but before such declaration is made and authenticated

as aforesaid, such payment shall be valid and shall discharge the Bank. 34 V., c. 7, s. 28.

13. If the transmission of any deposit or share is by virtue of the marriage of a female depositor, the declaration shall be accompanied by a copy of the register of such marriage and shall declare the identity of the wife with the holder of such deposit or share; and if the transmission has taken place by virtue of any testamentary instrument or by intestacy or by the vacancy of the estate of a deceased depositor or shareholder, the probate of the will, or, if it is notarial, an authentic copy thereof, or the letters of administration or act of tutorship, or authentic certificates of birth, as the case may be, shall, together with such declaration, be produced and left with the manager or other officer or agent of the Bank, who shall thereupon enter the name of the person entitled under such transmission in the books of the Bank. 34 V., c. 7, s. 29.

Transmission by marriage.

By testamentary instrument.

DEPOSITS AND LOANS.

14. The Bank may receive deposits of money for the benefit of persons depositing the same, and may invest the same as hereinafter provided, and may accumulate the revenues and profits derived from the investment of so much thereof as is not required to meet ordinary demands by the depositors, and, out of such accumulation, may allow and pay to the depositors thereof such rate of interest on such deposits as is, from time to time, fixed by the Governor in Council, not being more than five per cent. per annum. 34 V., c. 7, s. 14;—44 V., c. 8, s. 2.

Bank may receive deposits and pay interest.

15. Every depositor, on making his first deposit in the Bank, shall disclose and declare his name, residence, quality and occupation. 34 V., c. 7, s. 15.

Depositor to give name and address.

16. The Bank may receive deposits from any person, whatever is his status or condition of life, and whether such person is qualified by law to enter into ordinary contracts or not; and the Bank may pay the principal or any part thereof, and the whole or any part of the interest thereon, to such person, without the authority, aid, assistance or intervention of any person or official being required: Provided always, that if the person making any deposit in the Bank is not, by

Deposits by minors, &c.

Proviso.

the laws of the Province where the Bank is established, authorized so to do, the total amount of deposits made by such person shall not exceed the sum of two thousand dollars, 34 V., c. 7, s. 16.

Certain payments in good faith valid.

17. Any payment of interest or dividend, or of the whole or any part of any deposit, made in good faith to any person who appears *prima facie* to be entitled to such interest, dividend or deposit, by the production of a declaration in writing and of the documents herein mentioned in support thereof, shall be valid; and the discharge of such person shall be sufficient, and shall discharge the Bank from all or any further claim by any person for such interest, dividend or deposit. 34 V., c. 7, s. 31.

Amount to be invested in Dominion securities, &c.

18. The Bank shall always hold at least twenty per cent. of the moneys deposited with it in Dominion securities, or deposits in chartered Banks, on call. 36 V., c. 72, s. 1, *part*.

Investment of deposits.

19. The Bank may, subject to the provisions in the next preceding section contained, invest any moneys deposited therewith in any stock or public securities of Canada, or of any of the Provinces of Canada, or in any municipal debentures, or in the manner provided in the two sections next following, and not otherwise; but the Bank may continue to hold any stock of any now existing chartered Bank, held by it before it received its charter, and may sell and dispose of such stock. 34 V., c. 7, s. 17; 36 V., c. 72, s. 1, *part*.

Loans on certain securities.

20. The Bank may also loan such moneys, upon the personal security of individuals, or to any corporate bodies, if collateral securities of the nature mentioned in the next preceding section, or British or foreign public securities, or stock of some chartered Bank in Canada, or stock in any incorporated building society, or bonds or debentures, or stock of any incorporated institution or company, are taken in addition to such personal or corporate security, with authority to sell such securities if the loan is not paid. 34 V., c. 7, s. 18, *part*;—36 V., c. 72, s. 1, *part*.

No loans on real property.

21. The Bank shall not make any loan, directly or indirectly, upon the security of real property, or with any reference to the security of real property; but nothing

herein contained shall prevent the Bank from taking security upon real property in addition to such collateral securities, subsequently to the making of the loan and subsidiary to the security originally taken therefor. 34 V., c. 7, s. 18, *part.*

22. If the Bank makes any loan under the two sections next preceding, upon personal securities with collateral security, other than real property, for the repayment thereof, and if the repayment is not made within thirty days after such loan becomes due or payable, the Bank may sell the collateral security, after notice to the borrower or person depositing such collateral security, by addressing and mailing, to his last known place of residence, a letter containing such notice :

Enforcement of payment of loans made on collateral security.

2. Such sale may be so made, whatever is the nature of such collateral securities, whether consisting of stocks, bonds, debentures or negotiable paper; and the president or vice-president, manager, cashier or other officer of the Bank, thereunto authorized by the directors, may transfer and convey any security so sold to the purchaser, in whom the property in such security shall become vested by such conveyance or transfer, but without any warranty from the Bank, or from any officer thereof :

Further provision in case of non-payment.

3. The Bank shall only be bound to account to the person indebted to it in the amount of such loan, for the actual net proceeds of the sale of such collateral securities, after deduction of all costs and charges thereon :

How far bank shall be accountable.

4. Nothing herein contained shall prevent the Bank from collecting or realizing such debt, or any balance due thereon, out of such collateral securities, in any way which has been agreed on with the borrower depositing the same, or in any other lawful way that the directors deem for the interest of the Bank. 34 V., c. 7, s. 19.

Other recourse not affected.

23. The Bank may purchase any lands or real property offered for sale under execution at the suit of the bank, or exposed to sale by the bank under a power of sale given to it for that purpose, in cases in which, under similar circumstances, an individual could so purchase, without any restriction as to the value of the lands which it may so purchase, and may acquire a title thereto as any individual purchasing at

Purchase of property mortgaged to the bank.

sheriff's sale or under a power of sale, in like circumstances, could do, and may take, have, hold and dispose of the same at pleasure. 34 V., c. 7, s. 20.

Absolute title
may be acquired.

24. The Bank may acquire and hold an absolute title in or to land mortgaged to it as security for a debt due or owing to it, either by obtaining a release of the equity of redemption in the mortgaged property, or by procuring a foreclosure, or by other means whereby, as between individuals, an equity of redemption can, by law, be barred, or may purchase and acquire any prior mortgage or charge on such land. 34 V., c. 7, s. 21.

As to power
of sale, &c.

25. Nothing in any Act or law shall be construed as having prevented or as preventing the Bank from acquiring and holding an absolute title to and in any such mortgaged lands, whatever the value thereof may be, or from exercising or acting upon any power of sale contained in any mortgage given to it or held by it, authorizing or enabling it to sell or convey away any lands so mortgaged. 34 V., c. 7, s. 22.

Deposits on call
in chartered
banks.

26. Nothing herein contained shall prevent the Bank from depositing money in any of the chartered banks carrying on the general business of banking in the same place as the Bank; and such money shall be so deposited on call, and shall be subject to withdrawal at any time without notice, and either with or without interest. 34 V., c. 7, s. 24.

GENERAL PROVISIONS.

Distribution to
charitable insti-
tutions.

27. The directors of the Bank shall continue to distribute to charitable institutions yearly, as heretofore, the interest accruing on the amounts invested for that purpose:

Poor Fund at
Montreal.

2. The principal of the Poor Fund of the City and District Savings Bank of Montreal, which has been ascertained and settled at one hundred and eighty thousand dollars, shall continue invested, and shall be held by the said Bank in debentures of the cities of Toronto, Ottawa, Kingston, St. Catharines and Hull, and of the town of Bowmanville,—with power to change the investment of the same or of any part thereof, from time to time, with the approval and permission of the Treasury Board, but not otherwise:

3. The principal of the Charity Fund of *La Caisse d'Economie de Notre Dame de Québec*, which has been ascertained and settled at eighty-three thousand dollars, shall continue invested, and shall be held by the said Bank in debentures of the city of Québec,—with power to change the investment of the same or of any part thereof, from time to time, with the approval and permission of the Treasury Board, but not otherwise. 34 V., c. 7, s. 25, *part*;—36 V., c. 72, ss. 3 and 4.

Charity Fund
Québec.

28. The Bank shall not issue any Bank note, or note intended to circulate as money or as a substitute for money, or be deemed a Bank within the meaning of "*The Bank Act*." 34 V., c. 7, s. 35.

Bank notes not
to be issued.

29. The Bank shall not be bound to see to the execution of any trust, whether expressed, implied or constructive, to which any deposit or share therein is subject; and the receipt of the person in whose name any such deposit or share stands in the books of the Bank, or if it stands in the name of more persons than one, the receipt of one of the persons shall be a sufficient discharge to the Bank for such deposit or share, interest or dividend thereon, or for any other sum of money payable in respect of such deposit or share, unless express notice to the contrary has been given to the Bank, or such deposit is made upon express conditions as to the person or persons to whom such deposit shall be paid,—in which case such deposit shall be governed by such conditions, notwithstanding any trust to which such deposit is then subject, and whether or not the Bank has had notice of such trust; and the Bank shall not be bound to see to the application of the money paid on such receipt, whether given by one of such persons or by all of them. 34 V., c. 7, s. 30.

Bank not bound
to see to trusts.

RETURNS.

30. Monthly returns shall be made, by the Bank, to the Minister of Finance and Receiver General, and shall be made up within the first ten days of each month, and shall exhibit the condition of the Bank on the last juridical day of the month next preceding; and such monthly returns shall be signed by the president or vice-president, or the director then acting as president, and by the manager, cashier or other principal officer of the bank at its chief place of business, and shall be

Monthly returns
to be made to
the Minister of
Finance.

published in the *Canada Gazette*; and such monthly returns shall be in the form in the schedule to this Act, and shall be instead of any periodical returns, if any, required by the charter of the Bank, except the certified lists of shareholders. 36 V., c. 72, s. 2, *part*.

Annual lists of shareholders for Parliament.

31. The Bank shall furnish, annually, to the Minister of Finance and Receiver General, to be laid before Parliament within fifteen days after the opening of each session, certified lists of the shareholders, with their additions and residences, and the number of shares they respectively hold and the amounts paid up thereon. 44 V., c. 8, s. 6.

OFFENCES AND PENALTIES.

Punishment of officers committing certain offences.

32. Every officer, clerk or servant who is employed under the provisions of this Act, and who defaces, alters, erases, or in any manner or way whatsoever, changes the effect of the books of account kept under the provisions of this Act, or any entry in the said books of account, for any fraudulent purpose, —and every such officer, clerk or servant, who secretes, appropriates or embezzles any bond, obligation, bill or note, or any security for money, or any money or effects intrusted to him, or in his custody, or to which he has obtained access as such agent, officer, clerk or servant, to whomsoever the said property belongs, is guilty of felony, and, on conviction thereof, shall be liable to imprisonment for life: Provided always, that nothing herein contained, nor the conviction or punishment of the offender, shall prevent, lessen or impair any remedy which Her Majesty, or the Minister of Finance and Receiver General, or any other person, would otherwise have against any other person whatsoever. 34 V., c. 7, s. 32.

Proviso.

Punishment for falsely pretending to own deposits.

33. Every person who, with intent to defraud, falsely pretends to be the owner of any deposit made under this Act, or of the interest upon such deposit, and who is not such owner, and who demands or claims from the Bank with which such deposit has been made, or from any person employed under this Act, the payment of such deposit or interest, or of any portion thereof, as the case may be, and whether he does or does not thereby obtain any part of such deposit or interest, is guilty of a misdemeanor, and shall be punishable accordingly. 34 V., c. 7; s. 33, *part*.

34. The making of any wilfully false or deceptive statement in any account, return, report or other document respecting the affairs of the Bank is, unless it amounts to a higher offence, a misdemeanor; and every one who is a president, vice-president, director, auditor, cashier, or other officer of the Bank, and who prepares, signs, approves or concurs in such statement, return, report or document, or uses the same with intent to deceive or mislead any person, shall be held to have wilfully made such false statement, and shall further be responsible for all damages sustained by such person in consequence thereof. 34 V., c. 7, s. 34.

And for making
false statement
in any account,
&c.

SCHEDULE.

RETURN of the amount of liabilities and assets of the (name
of the Bank) on the day of 18

CAPITAL STOCK, \$. CAPITAL PAID UP, \$

LIABILITIES.

\$ cts.

1. Dominion Government deposits, payable on demand.....
2. Provincial Government deposits, payable on demand.....
3. Other deposits, payable on demand.....
4. Dominion Government deposits, payable after notice or on a fixed day.....
5. Provincial Government deposits, payable after notice or on a fixed day.....
6. Other deposits, payable after notice or on a fixed day.....
7. Special Poor Fund or Charity Fund Trust....
8. Liabilities not included under the foregoing heads.....

ASSETS.

1. Dominion securities.....
2. Provincial or municipal securities.....
3. Loans for which Dominion or Provincial securities are held as collateral security.

CHAPTER 127, A.D. 1886.

An Act respecting Interest.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

1. Except as otherwise provided by this or by any other Act of the Parliament of Canada, any person may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount which is agreed upon. C. S. C., c. 58, s. 3 ;—38 V., c. 18, s. 1.

2. Whenever interest is payable by the agreement of parties or by law, and no rate is fixed by such agreement or by law, the rate of interest shall be six per centum per annum. C. S. C., c. 58, s. 8 ;—36 V., c. 71, s. 1.

INTEREST ON MONEYS SECURED ON MORTGAGE.

3. Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement showing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance. 43 V., c. 42, s. 1.

4. Whenever the rate of interest shown in such statement is less than the rate of interest which would be chargeable by virtue of any other provision, calculation or stipulation in the mortgage, no greater rate of interest shall be chargeable, payable or recoverable, on the principal money advanced, than the rate shown in such statement. 43 V., c. 42, s. 2.

No fine allowed
on payments in
arrear.

5. No fine or penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrear of principal or interest secured by mortgage of real estate, which has the effect of increasing the charge on any such arrear beyond the rate of interest payable on principal money not in arrear; but nothing in this section contained shall have the effect of prohibiting a contract for the payment of interest on arrears of interest or principal at any rate not greater than the rate payable on principal money not in arrear. 43 V., c. 42, s. 3.

Proviso, as to
interest on
ar. ears of
interest.

Overcharge
may be re-
covered back.

6. If any sum is paid on account of any interest, fine or penalty not chargeable, payable or recoverable under the three sections next preceding, such sums may be recovered back, or deducted from any other interest, fine or penalty chargeable, payable or recoverable on the principal. 43 V., c. 42, s. 4.

No further
interest pay-
able after five
years on
certain con-
ditions.

7. Whenever any principal money or interest secured by mortgage of real estate is not, under the terms of the mortgage, payable till a time more than five years after the date of the mortgage, then, if, at any time after the expiration of such five years, any person liable to pay or entitled to redeem the mortgage tenders or pays to the person entitled to receive the money the amount due for principal money and interest to the time of payment, as calculated under the four sections next preceding, together with three months' further interest in lieu of notice, no further interest shall be chargeable, payable or recoverable at any time thereafter on the principal money or interest due under the mortgage. 43 V., c. 42, s. 5.

Application
of five sections
next preceding

8. The provisions of the five sections next preceding shall only apply to moneys secured by mortgage on real estate executed after the first day of July, in the year one thousand eight hundred and eighty. 43 V., c. 42, s. 6.

ONTARIO AND QUEBEC.

Ontario and
Quebec.

9. The two sections next following apply to the Provinces of Ontario and Quebec.

No higher
rate than six
per cent. to be
taken by any
corporation.

10. Except as otherwise provided by this or any other Act or law, no corporation or company or association of persons, not being a bank authorized by law before the sixteenth day of August, one thousand eight hundred and fifty-eight, to

lend or borrow money, shall, upon any contract, take directly or indirectly, for loan of any moneys, wares, merchandise or other commodities whatsoever, above the value of six dollars, for the advance or forbearance of one hundred dollars for a year, and so after that rate for a greater or less sum or value, or for a longer or shorter time :

2. Provided that any insurance company, incorporated by Act of the legislature of the late Province of Canada, or of either of the late Provinces of Upper or of Lower Canada, or by charter from Her Majesty, or by an Act of the Parliament of the United Kingdom, and any corporation constituted for religious, charitable or educational purposes, in the Provinces of Ontario or Quebec, authorized by law to lend or borrow money, may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount which is agreed upon, not exceeding eight per centum per annum. C. S. C., c. 58, ss. 6 and 9. *part* ;—C. S. U. C., c. 43, s. 4, *part* ;—23 V. (Can.), c. 34 ;—36 V., c. 70.

11. All bonds, bills, promissory notes, contracts and assurances whatsoever, made or executed in violation of the provisions of the section next preceding, whereupon or whereby a greater interest is reserved and taken than authorized by this or any other Act or law, shall be void; and every corporation, company and association of persons, not being a bank, authorized to lend or borrow money as aforesaid, which, directly or indirectly, takes, accepts and receives a higher rate of interest, shall incur a penalty equal to treble the value of the moneys, wares, merchandise, or other commodities lent or bargained for :

2. Such penalty may be recovered by action in any court of competent jurisdiction, and one moiety thereof shall belong to Her Majesty for the public uses of Canada, and the other moiety to the person who sues for the same. C. S. C., c. 58, s. 9, *part* ;—C. S. U. C., c. 43, s. 4, *part*.

NOVA SCOTIA.

12. The five sections next following apply to the Province of Nova Scotia, but shall not extend to any hypothecation or agreement in writing entered into for money advanced upon

the bottom of a ship or vessel, her cargo or freight. R. S. N. S. (2nd S.), c. 82, s. 3 ;—36 V., c. 71, s. 4.

Seven per cent may be stipulated for.

13. Any person may stipulate and agree in writing for any rate of interest not exceeding seven per centum per annum, for the loan or forbearance of money to be secured on real estate or chattels real ; and any person may stipulate in writing for or may receive in advance any rate of interest not exceeding ten per centum per annum, whenever the security for the payment of the money consists only of personal property or the personal responsibility of the person to whom forbearance is given, or of others. 36 V., c. 71, s. 2.

And ten per cent. in certain cases.

Excessive interest to be deducted.

14. In any action brought on any contract whatsoever, in which there is, directly or indirectly, taken or reserved a rate of interest exceeding that authorized in the next preceding section, the defendant may, the same being duly pleaded, as in other cases, prove such excessive interest, and it shall be deducted from the amount due on such contract. 36 V., c. 71, s. 3.

As to contracts entered into previous to 23rd May, 1873.

15. No person shall, upon any contract or security, made or entered into, given or taken before the twenty-third day of May, one thousand eight hundred and seventy-three, take, directly or indirectly, for the loan of moneys or goods, above the rate of six per centum per annum, and every such contract and security whereby a greater rate of interest is reserved shall be void ; and every person who takes or receives, upon any such contract or security, a greater rate, shall incur a penalty equal to treble the value of the moneys or goods in such contract or security contracted for or secured ; but no prosecution for any such penalty shall be commenced except within twelve months from the commission of the offence. R. S. N. S. (2nd S.), c. 82, ss. 1 and 6 ;—36 V., c. 71, s. 6.

Penalty.

Limitation of time.

Banks exempted.

16. Nothing in the three sections next preceding shall apply to any chartered bank. 36 V., c. 71, s. 7.

As to contracts respecting grain and live stock.

17. Any person may contract for the loan or hire of grain or live stock, upon halves or otherwise, upon the lender taking upon himself all risk of such stock, but if it appears that the same, or any part thereof, perished or was lost through

the wilful neglect of the borrower, he shall make good to the lender the full value thereof. R. S. N. S. (2nd S.), c. 82, s. 2.

NEW BRUNSWICK.

18. The five sections next following apply to the Province New Brunswick of New Brunswick with respect to :—

(a) Banks which are not subject to "*The Banks Act* ; "

(b) Other incorporated companies, but subject to any special provision in any other Act ; and—

(c) Contracts made between the thirteenth day of April in the year one thousand eight hundred and fifty-nine, and the eighth day of April, in the year one thousand eight hundred and seventy-five. 38 V., c. 18, ss. 2 and 3.

19. No person shall, directly or indirectly, receive on any contract, for the loan of any money or goods, more than six dollars for the forbearance of one hundred dollars for one year, and after that rate for a greater or lesser sum, and a longer or shorter time. 22 V. (N.B.) c. 21, s. 2, *part*.

Not more than six per cent to be taken.

20. No deed or contract for payment of any money loaned, or for the forbearance of any thing undertaken, upon or by which more than such rate of interest is reserved or received, shall be void by reason thereof. 22 V. (N.B.), c. 21, s. 2, *part*.

Contracts not void.

21. In any action brought on any contract whatsoever, in which there is, directly or indirectly, taken or reserved a rate of interest exceeding six per centum per annum, the defendant, or his attorney, may, under the general issue, with notice of defence as in other cases, prove such excessive interest, and it shall be deducted from the amount due on such contract. 22 V. (N. B.), c. 21, s. 3.

Excessive interest to be deducted.

22. Every Bank not subject to the "*Bank Act*" which, upon any such deed or contract, receives or reserves, by means of any loan, bargain, exchange or transfer of any money or goods, or by any deceitful means, for the forbearing or giving day of payment beyond a year, of its money or goods, more than six dollars for one hundred dollars for one year, and after that rate for a greater or lesser sum and longer or

Penalty if bank takes more than lawful rate.

Recovery and
application.

shorter time, shall incur a penalty equal to the value of the principal sum or goods so loaned, bargained, exchanged or transferred, and all interest and other profits accruing therefrom; and such penalty may be recovered by action in any court of record in the county in which the offence was committed,—which action shall be brought within twelve months from the time of such offence and not afterwards; and one moiety of such penalty shall belong to Her Majesty for the public uses of Canada, and the other moiety to the person who sues for the same. 22 V. (N. B.), c. 21, s. 4.

Certain
matters
excepted.

23. Nothing in the four sections next preceding shall apply to bottomry bonds or contracts on the bottom of any vessel, damages on protested bills allowed by law, penalties incurred for the non-fulfilment of any contract, if such penalties are mutually binding, and contracts for the loan or hire of any grain, cattle, or live stock let out as the parties agree, if the lender takes the risk of casualties upon himself, in which case the borrower shall not avail himself,—of any loss suffered through his wilful neglect, or any voluntary damage which is committed by him. 22 V. (N.B.), c. 21, s. 6.

PRINCE EDWARD ISLAND.

Prince Edward
Island.

28. The following provisions apply to the Province of Prince Edward Island.

What rate of
interest may
be recovered.

29. No person shall recover, in any court, more than six per centum per annum interest on any account, contract or agreement, unless it appears to the court that a higher rate of interest was agreed to in writing between the parties. 31 V. (P.E.I.) c. 8, s. 2.

Certain rights
and liabilities
not affected.

30. Nothing herein shall prejudice or affect the rights or remedies of any person, or diminish or alter the liabilities of any person, in respect of any act done previously to the fifteenth day of April, in the year one thousand eight hundred and seventy, and if interest was payable at that date upon any contract, express or implied, for the payment of the legal or current rate of interest, or upon any debt or sum of money by any rule of law, the same shall be recoverable as if the provisions of the next preceding section had not been enacted. 31 V. (P. E.I.) c. 8, ss. 3 and 4.

CHAPTER 145, A.D. 1886.

An Act respecting Accessories.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

FELONIES.

1. Every one who becomes an accessory before the fact to any felony, whether the same is a felony at common law or by virtue of any Act, may be indicted, tried, convicted and punished in all respects as if he were a principal felon. 31 V., c. 69, s. 9, *part*, and c. 72, s. 1 ;—32-33 V., c. 20, s. 8; *part*, and c. 21, s. 107, *part*.

Accessories before the fact to felony punishable as principals.

2. Every one who counsels, procures or commands any other person to commit any felony, whether the same is a felony at common law or by virtue of any Act, is guilty of felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon,—or may be indicted and convicted of a substantive felony, whether the principal felon has or has not been convicted, or is or is not amenable to justice,—and may thereupon be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished. 31 V., c. 2, s. 2.

Punishment of person counselling, etc., the committing of a felony.

3. In every felony, every principal in the second degree shall be punishable in the same manner as the principal in the first degree is punishable. 31 V., c. 69, s. 9, *part*, and c. 72, s. 3 ;—32-33 V., c. 21, s. 107, *part*.

Punishment of principal in second degree.

4. Every one who becomes an accessory after the fact to any felony, whether the same is a felony at common law or by virtue of any Act, may be indicted and convicted, either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive

Accessories after the fact may be indicted as such or as substantive felons.

felony, whether the principal felon has or has not been convicted, or is or is not amenable to justice, and may thereupon be punished in like manner as an accessory after the fact to the same felony, if convicted as an accessory, may be punished. 31 V. c. 72, s. 4 ;—32-33 V., c. 20, s. 8, *part*.

Punishment
of accessories
after the fact.

5. Every accessory after the fact to any felony (except when it is otherwise specially enacted), whether the same is a felony at common law or by virtue of any Act, shall be liable to imprisonment for any term less than two years. 31 V., c. 69, s. 9, *part*, and c. 72, s. 5, *part* ;—32-33 V., c. 19, s. 57, *part*.

Prosecution
of accessory
after principal
offender
convicted, &c.

6. If any principal offender is, in any wise, convicted of any felony, any accessory, either before or after the fact, may be proceeded against in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal felon dies or is pardoned or otherwise delivered before such attainder ; and every such accessory shall, upon conviction, suffer the same punishment as he would have suffered if the principal had been attainted. 31 V., c. 72, s. 6 ;—32-33 V., c. 20, s. 8, *part*.

MISDEMEANORS.

Abettors in
misdemeanors
punishable as
principals.

7. Every one who aids, abets, counsels or procures the commission of any misdemeanor, whether the same is a misdemeanor at common law, or by virtue of any Act, is guilty of a misdemeanor and liable to be tried, indicted and punished as a principal offender. 31 V., c. 72, s. 9 ;—32-33 V., c. 19, s. 57, *part*, and c. 21, s. 107, *part* ;—35 V., c. 32, s. 13 ;—40 V., c. 32, s. 1, *part*.

OFFENCES PUNISHABLE ON SUMMARY CONVICTION.

Abettors in
offences
punishable
summarily
punishable as
principals.

8. Every one who aids, abets, counsels or procures the commission of any offence punishable on summary conviction, either for every time of its commission, or for the first and second time only, or for the first time only, shall, on conviction, be liable for every first, second or subsequent offence, of aiding, abetting, counselling or procuring, to the same forfeiture and punishment to which a person guilty of a first, second or subsequent offence as a principal offender, is liable. 32-33 V., c. 21, c. 108, and c. 22, s. 70, and c. 31, s. 15, *part* ;—33 V., c. 31, s. 5, *part*.

CHAPTER 164, A. D., 1886.

An Act respecting Larceny and similar Offences.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

SHORT TITLE.

1. This Act may be cited as "*The Larceny Act.*"

Short title.

INTERPRETATION.

2. In this Act, unless the context otherwise requires :

Interpreta-
tion.

(a) The expression "document of title to goods" includes any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing, bought and sold note, or any other document used in the ordinary course of business as proof of the possession or control of goods, authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented or therein mentioned or referred to ;

" Document
of title to
goods "

(b) The expression "document of title to lands" includes any deed, map, paper or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title, to any real property, or to any interest in any real property, or any notarial or registrar's copy thereof, or any duplicate instrument, memorial, certificate or document authorized or required by any law in force in any part of Canada, respecting registration of titles, and relating to such title ;

" Document
of title to
land "

(c) The expression "trustee" means a trustee on some "Trustee." express trust created by some deed, will or instrument in writing, or a trustee of personal property created by parol, and includes the heir or personal representative of any such trustee, and every other person upon or to whom the duty of such trust has devolved or come, and also an executor and administrator, and an official manager, assignee,

liquidator or other like officer acting under any Act relating to joint stock companies, bankruptcy or insolvency, and any person who is, by the law of the Province of Quebec, an "*administrateur*," and the expression "trust" includes whatever is by that law an "*administration*;"

"Valuable
security"

(d) The expression "valuable security" includes any order, exchequer acquittance or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of Canada or of any Province thereof, or of the United Kingdom, or of Great Britain or Ireland, or of any British colony or possession, or of any foreign state, or in any fund of any body corporate, company or society, whether within Canada or the United Kingdom, or any British colony or possession, or in any foreign state or country, or to any deposit in any savings bank or other bank, and also includes any debenture, deed, bond, bill, note, warrant, order or other security whatsoever, for money or for payment of money, whether of Canada or of any Province thereof, or of the United Kingdom, or of any British colony or possession, or of any foreign state, and any document of title to lands or goods as hereinbefore defined, and any stamp or writing which secures or evidences title to or interest in any chattel personal, or any release, receipt, discharge or other instrument evidencing payment of money, or the delivery of any chattel personal; and every such valuable security shall, where value is material, be deemed to be of value equal to that of such unsatisfied money, chattel personal, share, interest or deposit, for the securing or payment of which, or delivery or transfer or sale of which, or for the entitling or evidencing title to which, such valuable security is applicable, or to that of such money or chattel personal, the payment or delivery of which is evidenced by such valuable security;

Property."

(e) The expression "property" includes every description of real and personal property, money, debts and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods,—and also not only such property as was originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conver-

sion or exchange, whether immediately or otherwise, and also any postal card, postage stamp or other stamp issued or prepared for issue by the authority of the Parliament of Canada or of the Legislature of any Province of Canada, for the payment of any fee, rate or duty whatsoever, and whether, still in the possession of the Crown, or of any person or corporation, or of any officer or agent of the Government of Canada, or of the Province by the authority of the Legislature whereof it was issued or prepared for issue; and such postal card or stamp shall be held to be a chattel, and to be equal in value to the amount of the postage, rate or duty which can be paid by it, and is expressed on its face in words or figures, or both;

(g) The expression "banker" includes any director of any ^{Banker."} incorporated bank or banking company;

(h) The expression "writing" includes any mode in which, ^{"Writing."} and any material on which words or figures at length or abridged are written, printed or otherwise expressed, or any map or plan is inscribed;

(i) Whenever the having anything in the possession of any ^{Having in} person is in this Act expressed to be an offence, then if any ^{custody or} person has any such thing in his personal custody or possession, ^{possession.} or knowingly or wilfully has any such thing in any dwelling-house or other building, lodging, apartment, field or other place open or enclosed, whether belonging to or occupied by himself or not, and whether such matter or thing is so had for his own use or benefit, or for that of another, such person shall be deemed to have such matter or thing in his custody or possession within the meaning of this Act, and if there are two or more persons, any one or more of whom, with the knowledge and consent of the rest, have any such thing in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of all of them. 32-33 V., c. 21, s. 1;—35 V., c. 33, s. 1, *part*;—40 V., c. 29, s. 1.

FRAUDS BY AGENTS, BANKERS OR FACTORS.

59. Every one who being a cashier, assistant cashier, ^{Stealing or} manager, officer, clerk or servant of any bank, or savings bank, ^{embezzling} secretes, embezzles or absconds with any bond, obligation, bill ^{by bank} ^{officer.}

obligatory or of credit, or other bill or note, or any security for money, or any money or effects intrusted to him as such cashier, assistant cashier, manager, officer, clerk or servant, whether the same belongs to the bank or belongs to any person, body corporate, society or institution, and is lodged with such bank, is guilty of felony, and liable to imprisonment for life or for any term not less than two years. 34 V., c. 5, s. 60, and c. 7, s. 32.

Agent &c.,
intrusted,
converting
money, &c.
to his own
use.

60. Every one who,—

(a) Having been entrusted, either solely or jointly with any other person, as a banker, merchant, broker, attorney or other agent, with any money or security for the payment of money, with any direction in writing, to apply, pay or deliver such money or security, or any part thereof respectively, or the proceeds or any part of the proceeds of such security, for any purpose, or to any person specified in such direction,—in violation of good faith and contrary to the terms of such direction, in anywise converts to his own use or benefit, or the use or benefit of any person other than the person by whom he has been so intrusted, such money, security or proceeds, or any part thereof, respectively, or—

Or any chattel, valuable security or power of attorney

(b) Having been intrusted, either solely or jointly with any other person as a banker, merchant, broker, attorney or other agent, with any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of the United Kingdom or any part thereof, or of Canada or of any province thereof, or of any British colony, possession, or of any foreign state, or in any stock or fund of any body corporate, company or society, for safe custody or for any special purpose, without any authority to sell, negotiate, transfer or pledge,—in violation of good faith, and contrary to the object or purpose for which such chattel, security or power of attorney has been intrusted to him, sells, negotiates, transfers, pledges, or in any manner converts to his own use or benefit, or the use or benefit of any person other than the person by whom he has been so intrusted, such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney relates, or any part thereof,—

Is guilty of a misdemeanor, and liable to seven years' imprisonment: Punishment.

2. Nothing in this section contained relating to agents shall affect any trustee in or under any such instrument whatsoever, or any mortgagee of any property, real or personal, in respect to any act done by such trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage; nor shall restrain any banker, merchant, broker, attorney or other agent from receiving any money due or to become actually due and payable, upon or by virtue of any valuable security, according to the tenor and effect thereof, in such manner as he might have done if this Act had not been passed; nor from selling, transferring, or otherwise disposing of any securities or effects in his possession, upon which he has any lien, claim or demand, entitling him by law so to do, unless such sale, transfer or other disposal extends to a greater number or part of such securities or effects than are requisite for satisfying such lien, claim or demand. Not to apply to trustees or mortgagees. Nor to bankers, &c., receiving money due on securities. Or disposing of securities on which they have a lien. 32-33 V., c. 21, s. 76.

61. Every one who, being a banker, merchant, broker, attorney or agent, and being intrusted, either solely or jointly with any other person, with the property of any other person for safe custody,—with intent to defraud, sells, negotiates, transfers, pledges, or in any other manner converts the same or any part thereof to his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, is guilty of a misdemeanor, and liable to seven years' imprisonment. Bankers, &c., fraudulently selling, &c., property intrusted to their care. 32-33 V., c. 21, s. 77.

62. Every one who, being intrusted, either solely or jointly with any other person, with any power of attorney, for the sale or transfer of any property,—fraudulently sells or transfers, or otherwise converts the same or any part thereof to his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, is guilty of a misdemeanor, and liable to seven years' imprisonment. Persons under powers of attorney fraudulently selling property. 32-33 V., c. 21 s. 78.

63. Every one who, being a factor, or agent intrusted, either solely or jointly with any other person, for the purpose of sale or otherwise, with the possession of any goods or of any document of title to goods,—contrary to or without the authority of Factors obtaining advances on the property of their principals

his principal in that behalf for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, and in violation of good faith, makes any consignment, deposit, transfer or delivery of any goods or document of title so intrusted to him as in this section before mentioned, as and by way of a pledge, lien or security for any money or valuable security borrowed or received by such factor or agent at or before the time of making such consignment, deposit, transfer or delivery, or intended to be thereafter borrowed or received,—or contrary to or without such authority, for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, and in violation of good faith, accepts any advance of any money or valuable security on the faith of any contract or agreement to consign, deposit, transfer or deliver any such goods or document of title, is guilty of a misdemeanor, and liable to seven years' imprisonment:

Persons
wilfully
assisting.

2. Every one who, knowingly and wilfully acts and assists in making any such consignment, deposit, transfer or delivery, or in accepting or procuring such advance as aforesaid, is guilty of a misdemeanor, and liable to the same punishment:

Exception
when the
pledge does
not exceed
the amount of
their lien.

3. No such factor or agent shall be liable to any prosecution for consigning, depositing, transferring or delivering any such goods or documents of title, if the same are not made a security for or subject to the payment of any greater sum of money than the amount which, at the time of such consignment, deposit, transfer or delivery, was justly due and owing to such agent from his principal, together with the amount of any bill of exchange drawn by or on account of such principal and accepted by such factor or agent. 32-33 V., c. 21, s. 79.

When agent
shall be
deemed to be
intrusted with
the goods.

64. Any factor or agent intrusted, as aforesaid, and possessed of any such document of title, whether derived immediately from the owner of such goods or obtained by reason of such factor or agent having been intrusted with the possession of the goods, or of any other document of title thereto, shall be deemed to have been intrusted with the possession of the goods represented by such document of title; and every contract pledging or giving a lien upon such document of title

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as aforesaid, shall be deemed to be a pledge of and lien upon the goods to which the same relates; and such factor or agent shall be deemed to be possessed of such goods or document, whether the same are in his actual custody or held by any other person subject to his control, or for him, or on his behalf; and whenever any loan or advance is *bona fide* made to any factor agent intrusted with and in possession of any such goods or document of title, on the faith of any contract or agreement in writing to consign, deposit, transfer or deliver such goods or document of title, and such goods or document of title is or are actually received by the person making such loan or advance, without notice that such factor or agent was not authorized to make such pledge or security, every such loan or advance shall be deemed to be a loan or advance on the security of such goods or document of title, within the meaning of the next preceding section, though such goods or document of title are not actually received by the person making such loan or advance till a period subsequent thereto; and any contract or agreement, whether made direct with such factor or agent or with any clerk or other person on his behalf, shall be deemed a contract or agreement with such factor or agent; and any payment made, whether by money or bill of exchange, or other negotiable security, shall be deemed to be an advance within the meaning of the next preceding section; and a factor or agent in possession, as aforesaid, of such goods or document, shall be taken, for the purpose of the next preceding section, to have been intrusted therewith by the owner thereof, unless the contrary is shown in evidence. 32-33 V., c. 21, s. 80.

What shall be deemed a pledge.

What shall be deemed possession.

What shall be deemed a loan or advance on such goods.

What shall be deemed a contract.

What shall be deemed an advance.

Possession to be evidence of intrusting.

65. Every one who, being a trustee of any property for the use or benefit, either in whole or in part, of some other person or for any public or charitable purpose, with intent to defraud converts or appropriates the same, or any part thereof, to or for his own use or benefit or the use or benefit of any person other than such person as aforesaid, or for any purpose other than such public or charitable purpose as aforesaid, or otherwise disposes of or destroys such property or any part thereof, is guilty of a misdemeanor, and liable to seven years' imprisonment:

Trustees fraudulently disposing of property.

No prosecution without sanction of the Attorney General.

2. No proceeding or prosecution for any offence mentioned in this section shall be commenced without the sanction of the Attorney General or Solicitor General for the Province in which the same is to be instituted :

When civil proceedings have been taken.

3. When any civil proceeding has been taken against any person to whom the provisions of this section apply, no person who has taken such civil proceeding shall commence any prosecution under this section without the sanction of the court or judge before whom such civil proceeding has been had or is pending. 32-33 V., c. 21, s. 81.

Directors &c., of any body corporate or public company fraudulently appropriating property.

66. Every one who, being a director, member, manager or officer of any body corporate or company, fraudulently takes or applies, for his own use or benefit, or for any use or purpose other than the use or purpose of such body corporate or company, any of the property of such body corporate or company is guilty of a misdemeanor, and liable to seven years' imprisonment. 32-33 V., c. 21, s. 82.

Or fraudulently keeping false accounts or books.

67. Every one who being a director, member, manager or officer of any body corporate or company, as such receives or possesses himself of any of the property of such body corporate or company, otherwise than in payment of a just debt or demand, and, with intent to defraud omits to make or to cause or direct to be made a full and true entry thereof in the books and accounts of such body corporate or company is guilty of a misdemeanor, and liable to seven years' imprisonment. 32-33 V., c. 21, s. 83.

Or wilfully destroying or falsifying books or papers, &c.

68. Every one who, being a director, manager, officer or member of any body corporate or company with intent to defraud, destroys, alters, mutilates or falsifies any book, paper writing or valuable security belonging to the body corporate or company, or makes or concurs in the making of any false entry or omits or concurs in omitting any material particular in any book of account or document, is guilty of a misdemeanor and liable to seven years' imprisonment. 32-33 V., c. 21, s. 84.

Or fraudulently publishing false statements or accounts.

69. Every one who, being a director, manager, officer, or member of any body corporate or company, makes, circulates or publishes, or concurs in making, circulating or publishing any written statement or account which he knows to be false in

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any material particular, with intent to deceive or defraud any member, shareholder or creditor of such body corporate or company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or company, or to enter into any security for the benefit thereof, is guilty of a misdemeanor and liable to seven years' imprisonment. 32-33 V., c. 21, s. 85.

70. Every one who, being an officer or member of any unincorporated body or society, associated together for any lawful purpose fraudulently takes or applies to his own use or benefit, or for any use or purpose other than the use or purpose of such body or society, the whole or any portion of the funds, moneys or other property of the society, and continues to withhold such property after due demand has been made for the restoration and payment of the same by some one or more of the members or officers duly appointed by and on behalf of the body or society, is guilty of a misdemeanor, and liable to three years' imprisonment. C. S. C., c. 71, s. 8;—R. S. B. C., c. 162, s. 9.

Embezzlement
by officers, &c.,
of unincorporated
societies.

71. Nothing in any of the twelve sections next preceding shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity or to answer any question or interrogatory in any civil proceeding in any court, or upon the hearing of any matter in bankruptcy or insolvency; and no person shall be liable to be convicted of any of the misdemeanors in the said sections mentioned by any evidence whatsoever, in respect of any act done by him, if, at any time previously to his being charged with such offence, he has first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit or proceeding *bonafide* instituted by any party aggrieved, or if he has first disclosed the same in any compulsory examination or deposition before any court, upon the hearing of any matter in bankruptcy or insolvency. 32-33 V., c. 21, s. 86.

No person to
be exempt
from answer-
ing questions
in any court;
but no person
making a dis-
closure in any
compulsory
proceeding
to be liable to
prosecution.

72. Nothing in the thirteen sections next preceding, nor any proceeding, conviction or judgment had or taken thereon against any person under any of the said sections shall prevent

No remedy at
law or in
equity to be
affected

lessen or impeach any remedy at law or in equity, which any person aggrieved by any offence against any of the said sections would have had if this Act had not been passed; but no conviction of any such offender shall be received evidence in any action or suit against him; and nothing in the said sections contained shall affect or prejudice any agreement entered into or security given by any trustee, having for its object the restoration or payment of any trust property misappropriated. 32-33 V., c. 21, s. 87.

Keepers of
warehouses,
etc., giving
false receipts.

73. Every one who,—

(a) Being the keeper of any warehouse, or a forwarder, miller, master of a vessel, wharfinger, keeper of a cove, yard, harbor or other place for storing timber, deals, staves, boards or lumber, curer or packer of pork, or dealer in wool, carrier, factor, agent or other person, or a clerk or other person in his employ, knowingly and wilfully gives to any person a writing purporting to be a receipt for or an acknowledgment of any goods or other property as having been received into his warehouse, vessel, cove, wharf or other place, or in any such place about which he is employed, or in any other manner received, by him or by the person in or about whose business he is employed before the goods or other property named in such receipt, acknowledgment or writing have been actually delivered to or received by him as aforesaid, with intent to mislead, deceive, injure or defraud any person whomsoever, although such person is then unknown to him, or—

Using false
receipts.

(b) Knowingly and wilfully accepts, transmits or uses any such false receipt or acknowledgement or writing,—

Punishment.

Is guilty of a misdemeanor, and liable to three years, imprisonment. 32-33 V., c. 21, s. 88;—34 V., c. 5, s. 64.

Owner's selling
after a loan
by consignees.

74. Every one who—

(a) Having, in his name, shipped or delivered to the keeper of any warehouse, or to any other factor, agent or carrier, to be shipped or carried, any merchandise upon which the consignee has advanced any money or given any valuable security afterwards with intent to deceive, defraud or injure such consignee, in violation of good faith and without the consent of

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such consignee, makes any disposition of such merchandise different from and inconsistent with the agreement made in that behalf between him and such consignee at the time of or before such money was so advanced, or such negotiable security so given, or—

(b) Knowingly and wilfully acts and assists in making such disposition for the purpose of deceiving, defrauding or injuring such consignee,—

Persons wilfully assisting.

Is guilty of a misdemeanor, and liable to three years' imprisonment:—

2. No person shall be subject to prosecution under this section who, before making such disposition of the merchandise aforesaid, pays or tenders to the consignee the full amount of any advance made thereon. 32-33 V., c. 21, s. 89.

No prosecution if advances are paid.

75. Every one who,—

Making false statements in receipts for grain, &c.

(a) Wilfully makes any false statement in any receipt, certificate or acknowledgment for grain, timber or other goods or property, which can be used for any of the purposes mentioned in "The Bank Act," or—

(b) Having given, or after any clerk or person in his employ has, to his knowledge, given, as having been received by him in any mill, warehouse, vessel, cove or other place, any such receipt, certificate or acknowledgment for any such grain, timber or other goods or property,—or having obtained any such receipt, certificate or acknowledgment, and after having indorsed or assigned it to any bank or person,—afterwards, and without the consent of the holder or indorsee, in writing, or the production and delivery of the receipt, certificate or acknowledgment, wilfully alienates or parts with, or does not deliver to such holder or indorsee of such receipt, certificate or acknowledgment, the grain, timber, goods or other property therein mentioned,—

Fraudulently alienating or retaining property to which receipt refers.

Is guilty of a misdemeanor, and liable to three years imprisonment. 32-33 V., c. 21, s. 90, *part*;—34 V., c. 5 s. 65.

Punishment.

As to
partners.

76. If any misdemeanor, mentioned in any of the three sections next preceding, is committed by the doing of anything in the name of any firm, company or co-partnership of persons, the person by whom such thing is actually done, or who connives at the doing thereof, is guilty of the misdemeanor and not any other person. 32-23 V., c. 21, s. 91;—34 V., c. 5, s. 66.

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34 V., c.

CHAPTER 165, A. D. 1886.

An Act respecting Forgery.

TRANSFERS OF STOCK, ETC.

8. Every one who, with intent to defraud, forges or alters, ^{Forging transfer of stock, &c.} or offers, utters, disposes of or puts off, knowing the same to be forged or altered, any transfer of any share or interest of or in any stock, annuity or other public fund which now is or hereafter may be transferable in any of the books of the Dominion of Canada, or of any Province of Canada, or of any bank at which the same is transferable, or of or in the capital stock of any body corporate, company or society which now is or hereafter may be established by charter, or by, under or by virtue of any Act of Parliament of the United Kingdom or of Canada, or by any Act of the Legislature of any Province of Canada,—or forges or alters, or offers, utters, disposes of or puts off, knowing the same to be forged or altered, any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund or capital stock, or any claim for a grant of land from the Crown in Canada, or for any scrip or other payment or allowance in lieu of any such grant of land, or to receive any dividend or money payable in respect of any such share or interest,—or demands or endeavors to have any such share or interest transferred, or to receive any dividend or money payable in respect thereof, or any such grant of land, or scrip or payment or allowance in lieu thereof as aforesaid, by virtue of any such forged or altered power of attorney or other authority, knowing the same to be forged or altered, is guilty of felony, and liable to imprisonment for life. 32-33 V., c. 19, s. 5.

9. Every one who falsely and deceitfully personates any ^{Personating the owner of certain stock, &c., and transferring or receiving, or endeavor-} other of any share, or interest of or in any stock, annuity or other public fund, which now is or hereafter may be transferable in any of the books of the Dominion of Canada, or

ing to transfer
or receive the
dividends.

of any Province of Canada, or of any bank at which the same is transferable, or any owner of any share or interest of or in the capital stock of any body corporate, company or society which now is or hereafter may be established by charter, or by, under or by virtue of any Act of Parliament of the United Kingdom or of Canada, or by any Act of the Legislature of any Province of Canada, or of any claim for a grant of land from the Crown in Canada, or for any scrip or other payment or allowance in lieu of such grant of land, or any owner of any dividend or money payable in respect of any such share or interest as aforesaid,—and thereby transfers or endeavors to transfer any share or interest belonging to any such owner, or thereby receives or endeavors to receive any money due to any such owner, or to obtain any such grant of land, or such scrip or allowance in lieu thereof as aforesaid, as if such offender were the true and lawful owner, is guilty of felony, and liable to imprisonment for life. 32-33 V., c. 19, s. 6.

Forging
attestation to
power of
attorney for
transfer of
stock, &c.

10. Every one who forges any name, handwriting or signature purporting to be the name, handwriting or signature of a witness attesting the execution of any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund or capital stock, or grant of land or scrip or allowance in lieu thereof, as in either of the two sections next preceding mentioned, or to receive any dividend or money payable in respect of any such share or interest,—or offers, utters, disposes of or puts off any such power of attorney or other authority, with any such forged name, handwriting or signature thereon, knowing the same to be forged, is guilty of felony, and liable to seven years' imprisonment. 32-33 V., c. 19, s. 7.

BANK NOTES.

Forging bank
notes and
bills.

18. Every one who, with intent to defraud, forges or alters, or offers, utters, disposes of or puts off, knowing the same to be forged or altered, any note or bill of exchange of any body corporate, company or person carrying on the business of bankers, commonly called a bank note, a bank bill of exchange or bank post bill, or any indorsement on or assignment of any

bank note, bank bill of exchange or bank post bill, is guilty of felony, and liable to imprisonment for life. 32-33 V., c. 19, s. 15.

19. Every one who, without lawful authority or excuse, the proof whereof shall lie on him, purchases or receives from any other person, or has in his custody or possession any forged bank note, bank bill of exchange or bank post bill, or blank bank note, blank bank bill of exchange or blank bank post bill, knowing the same to be forged, is guilty of felony, and liable to fourteen years' imprisonment. 32-23 V., c. 19, s. 16.

Purchasing or receiving or having forged bank notes or bills.

MAKING PAPER AND ENGRAVING PLATES FOR BANK NOTES, ETC.

20. Every one who, without lawful authority or excuse, the proof whereof shall lie on him, makes or uses, or knowingly has in his custody or possession, any frame, mould or instrument for the making of paper used for Dominion or Provincial notes, or for bank notes, with any words used in such notes, or any part of such words, intended to resemble or pass for the same, visible in the substance of the paper, or for the making of paper with curved or waving bar lines, or with laying wire lines thereof, in a waving or curved shape, or with any number, sum or amount, expressed in a word or words in letters, visible in the substance of the paper, or with any device or distinction peculiar to and appearing in the substance of the paper used for such notes, respectively,—or makes, uses, sells, exposes for sale, utters or disposes of, or knowingly has in his custody or possession any paper whatsoever with any words used in such notes, or any part of such words, intended to resemble and pass for the same, visible in the substance of the paper, or any paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum or amount expressed in a word or words in letters appearing visible in the substance of the paper, or with any device or distinction peculiar to and appearing in the substance of the paper used for any such notes respectively—or by any art or contrivance, causes any such words or any part of such words, intended to resemble and pass for the same, or any device or distinction peculiar to and appearing

Making or having moulds for making paper with words used for Dominion notes, bank notes, etc.

Or selling such paper or having it in possession.

Or causing
distinctive
marks to
appear
thereon.

in the substance of the paper used for any such notes, respectively, to appear visible in the substance of any paper, or causes the numerical sum or amount of any such note, in a word or words in letters to appear visible in the substance of the paper, whereon the same is written or printed, is guilty of felony, and liable to fourteen years' imprisonment. 32-33 V., c. 19, s. 17.

Exception as
to paper used
for bills of ex-
change, &c.

21. Nothing in the next preceding section contained shall prevent any person from issuing any bill of exchange or promissory note, having the amount thereof expressed in a numerical figure or figures denoting the amount thereof in pounds or dollars, appearing visible in the substance of the paper upon which the same is written or printed, or shall prevent any person from making, using or selling any paper having waving or curved lines, or any other devices in the nature of water marks visible in the substance of the paper, not being bar lines or laying wire lines, provided the same are not so contrived as to form the groundwork or texture of the paper, or to resemble the waving or curved, laying wire lines or bar lines, or the water-marks of the paper used for Dominion notes or Provincial notes or bank notes, as aforesaid. 32-33 V., c. 19, s. 18.

Engraving or
having plate
for making
Dominion or
bank notes.

22. Every one who, without lawful authority or excuse, the proof whereof shall lie on him, engraves or in anywise makes upon any plate whatsoever, or upon any wood, stone or other material, any promissory note or part of a promissory note, purporting to be a Dominion or Provincial note, or bank note, or to be a blank Dominion or Provincial note or bank note, or to be a part of any Dominion or Provincial note, or bank note, as aforesaid, or any name word or character resembling, or apparently intended to resemble, any subscription to any such Dominion or Provincial note, or bank note, as aforesaid,—or uses any such plate, wood, stone or other material, or any other instrument or device for the making or printing of any such note, or part of such note,—or knowingly has in his custody or possession any such plate, wood, stone or other material, or any such instrument or device,—or knowingly offers, utters, disposes of or puts off, or has in his custody or possession any paper upon which any blank Dominion or Provincial note, or bank note, or part of any such note, or any name, word or character resembling, or apparently intended to

Unlawfully
uttering such
note or part
thereof.

resemble, any such subscription, is made or printed, is guilty of felony and liable to fourteen years' imprisonment. 31 V., c. 46, s. 14;—32-33 V., c. 19, s. 19.

23. Every one who, without lawful authority or excuse, the proof whereof shall lie on him, engraves or in anywise makes upon any plate whatsoever, or upon any wood, stone or other material, any word, number, figure, device, character or ornament, the impression taken from which resembles, or is apparently intended to resemble, any part of a Dominion or Provincial note, or bank note, or uses or knowingly has in his custody or possession any such plate, wood, stone or other material, or any other instrument or device for the impressing or making upon any paper or any other material, any word, number figure, character or ornament, which resembles, or is apparently intended to resemble, any part of any such note as aforesaid, or knowingly offers, utters, disposes of or puts off, or has in his custody or possession any paper or other material upon which there is an impression of any such matter as aforesaid, is guilty of felony, and liable to fourteen years' imprisonment. 32-33 V., c. 19, s. 20.

Engraving on a plate, etc., any word, number, or device, resembling part of a note.

24. Every one who, without lawful authority or excuse, the proof whereof shall lie on him, makes or uses any frame, mould or instrument for the manufacture of paper, with the name or firm of any bank or body corporate, company or person carrying on the business of bankers, appearing visible in the substance of the paper, or knowingly has in his custody or possession any such frame, mould or instrument,—or makes, uses, sells, or exposes for sale, utters or disposes of or knowingly has in his custody or possession any paper, in the substance of which the name or firm of any such bank, body corporate, company or person appears visible, or, by any art or contrivance causes the name or firm of any such Bank, body corporate, company or person to appear visible in the substance of the paper upon which the same is written or printed, is guilty of felony, and liable to fourteen years' imprisonment. 32-33 V., c. 19, s. 21.

Making or having mould for making paper with the name of any bank, or making or having such paper.

25. Every one who forges or alters, or offers, utters, disposes of or puts off, knowing the same to be forged or altered, any bill of exchange, promissory note, undertaking or order

Forging foreign bills and uttering the same.

Engraving
plates for
foreign bills
or notes, or
using or
having such
plates.

Uttering
paper on
which any
part of such
bill or note
is printed.

Forging bills
of exchange
or promissory
notes.

for payment of money, in whatsoever language or languages the same is expressed, and whether the same is or is not under seal, purporting to be the bill, note, undertaking or order of any foreign prince or state, or of any minister or officer in the service of any foreign prince or state, or of any body corporate or body of the like nature, constituted or recognized by any foreign prince or state, or of any person or company of persons resident in any country not under the dominion of Her Majesty,—and every one who, without lawful authority or excuse, the proof whereof shall lie on him, engraves, or in anywise makes upon any plate whatsoever, or upon any wood, stone or other material, any bill of exchange, promissory note, undertaking or order for payment of money, or any part of any bill of exchange, promissory note, undertaking or order for payment of money, in whatsoever language the same is expressed, and whether the same is or is not, or is or is not intended to be under seal, purporting to be the bill, note, undertaking or order or part of the bill, note, undertaking or order of any foreign prince or state, or of any minister or officer in the service of any foreign prince or state, or of any body corporate or body of the like nature, constituted or recognized by any foreign prince or state, or of any person or company of persons resident in any country not under the dominion of Her Majesty,—or uses or knowingly has in his custody or possession any plate, stone, wood or other material, upon which any such foreign bill, note, undertaking, order, or any part thereof, is engraved or made,—or knowingly offers, utters, disposes of or puts off, or has in his custody or possession any paper upon which any part of any such foreign bill, note, undertaking or order is made or printed, is guilty of felony, and liable to fourteen years' imprisonment. 32-33 V., c. 19, s. 22.

DEEDS, WILLS, BILLS OF EXCHANGE, ETC.

28. Every one who, with intent to defraud, forges or alters, or offers, utters, disposes of or puts off, knowing the same to be forged or altered, any bill of exchange, or any acceptance, indorsement or assignment of any bill of exchange, or any promissory note for the payment of money, or any indorsement on or assignment of any such promissory note, is guilty of felony, and liable to imprisonment for life. 32-33 V., c. 19, s. 25.

29. Every one who, with intent to defraud, forges or alters, or offers, utters, disposes of or puts off, knowing the same to be forged or altered, any undertaking, warrant, order authority or request for the payment of money or for the delivery or transfer of any goods or chattels or of any note, bill, or other security for the payment of money, or for procuring or giving credit, or any indorsement on or assignment of any such undertaking, warrant, order, authority or request, or any accountable receipt, acquittance or receipt for money or for goods, or for any note, bill or other security for the payment of money, or any indorsement on or assignment of any such accountable receipt, or any account book or thing, written or printed, or otherwise made capable of being read, is guilty of felony, and liable to imprisonment for life. 32-33 V., c. 19, s. 26.

Forging orders, receipts, etc., for money, goods, etc.

30. Every one who, with intent to defraud, draws, makes, signs, accepts or indorses any bill of exchange or promissory note, or any undertaking, warrant, order, authority or request for the payment of money, or for the delivery or transfer of goods or chattels, or of any bill, note or other security for money, by procuration or otherwise, for, in the name, or in the account of any other person, without lawful authority or excuse—or offers, utters, disposes of or puts off any such bill, note, undertaking, warrant, order, authority or request, so drawn, made, signed, accepted or indorsed, by procuration or otherwise, without lawful authority or excuse, knowing the same to have been so drawn, made, signed, accepted or indorsed, as aforesaid, is guilty of felony, and liable to fourteen years' imprisonment. 32-33 V., c. 19, s. 27.

Making or accepting any bill, &c., by procuration without lawful authority, or uttering such bill.

31. Whenever any cheque or draft on any banker is crossed with the name of a banker, or with two transverse lines with the words "and company," or any abbreviation thereof, every one who, with intent to defraud, obliterates, adds to or alters any crossing, or offers, utters, disposes of or puts off any cheque or draft whereon any such obliteration, addition or alteration has been made, knowing the same to have been made, is guilty of felony, and liable to imprisonment for life. 32-33 V., c. 19, s. 28.

Obliterating crossing on cheques.

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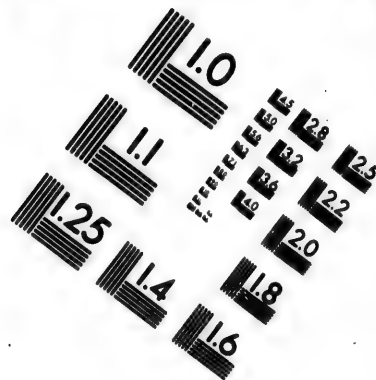
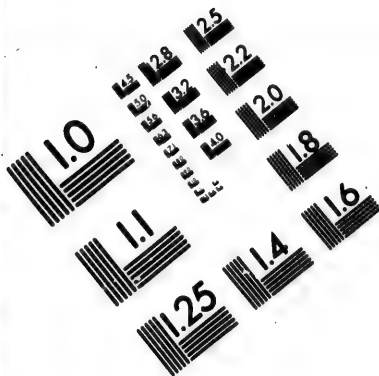
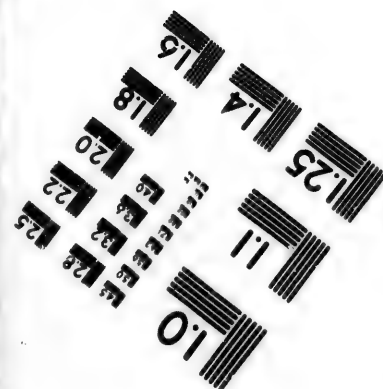
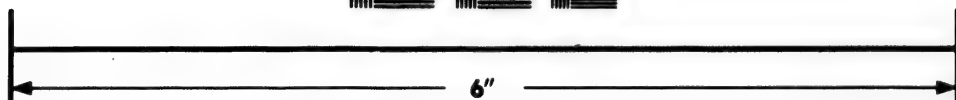
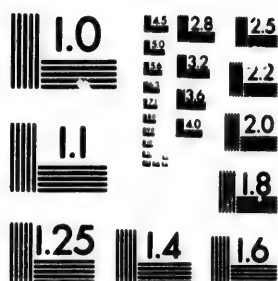


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